Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT ROOSEVELT PARKER, JR.,
Petitioner,
v.
THE OREGON STATE BOARD OF BAR EXAMINERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

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QUESTIONS PRESENTED

1. Whether a State, in exercising control of admission to the practice of law through its State Bar and Supreme Court, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by placing the burden of proof on an otherwise qualified applicant to demonstrate by '"clear and convincing evidence" that the applicant "Is a person of good moral character and fit to practice law."

2. Whether a State, in exercising control of admission to the practice of law through its State Bar and Supreme Court, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution when its Supreme Court ignores its directly applicable precedent (favorable to petitioner) in denying petitioner-applicant admission to the practice of law.

3. Whether a State, in exercising control of admission to the practice of law through its State Bar and Supreme Court, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by denying petitioner-applicant admission to the practice of law for lack of "good moral character" on a record that has "no evidence" to support that conclusion.

4. Whether a State, in exercising control of admission to the practice of law through its State Bar and Supreme Court, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by denying admission to the practice of law to petitioner-applicant for failure to sustain the burden of proof as to "good moral character", in face of the applicable authority of Speiser v. Randall, 357 U.S. 513 (1958).

5. Whether a State, in exercising control of admission to the practice of law through its State Bar and Supreme Court, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, on its face and as applied, by denying petitioner-applicant admission to the practice of law because of failure to establish "good moral character" by "clear and convincing evidence."

CONTENTS

Questions presented i

Opinion below 1

Jurisdiction 1

Statement 2

Reasons for granting the writ 14

Conclusion 29

Appendix

1. United States Constitutional Provisions 1a
1A. Oregon Statutes and Rules 5a
2. Recommendation of Oregon State Bar (BBX) 13a
3. *In Re Parker* (decision below) 35a
4. Petition for Reconsideration 55a
4A. Order Denying Petition for Reconsideration 67a
5. Entered Judgment Herein 71a
6. Excerpts from BBX (Board of Bar Examiners) Hearing Transcript: (Hill, Parker, Burns) 75a
7. *In Re Steffen*, 279 Or. 313, 567 P.2d 544 (1977) 89a

AUTHORITIES

CASES:

U.S. Cases

Addington v. Texas, 441 U.S. 418 (1979) 21, 22

Board of Regents v. Roth, 408 U.S. 564 (1972) 17

Bouie v. City of Columbia, 378 U.S. 347 (1964) 26

Boykin v. Alabama, 395 U.S. 238 (1969) 5

Cardinale v. Louisiana, 394 U.S. 439 (1969) 5

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 5, 20

Douglas v. Buder, 412 U.S. 430 (1973) 25, 26

Exarchou v. Murff, 265 F.2d 504 (2d Cir. 1959) 27

Garner v. Louisiana, 368 U.S. 157 (1961) 26

Goldberg v. Kelly, 397 U.S. 254 (1970) 17

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 20

Griffiths, In Re, 413 U.S. 717 (1973) 19

Harris v. United States, 404 U.S. 1232 (1971) 26

Herndon v. Georgia, 295 U.S. 441 (1935) 4

Konigsberg v. State Bar, 353 U.S. 252 (1957) 21

Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) 21

Mathews v. Eldridge, 424 U.S. 319 (1976) 17, 18, 21, 22, 28

Medina v. California, __ U.S. __, 112 S.Ct. 2572 (1992) 20, 22

Michael H. v. Gerald D., __ U.S. __, 109 S.Ct. 3001 (1987) 22

Napue v. Illinois, 360 U.S. 264 (1959) 15

New York Times v. Sullivan, 376 U.S. 254 (1964) 19

Raley v. Ohio, 360 U.S. 423 (1959) 5

Ruffalo, In Re, 390 U.S. 544 (1968) 11, 12

Santosky v. Kramer, 455 U.S. 745 (1982) 21, 22

Schware v. Board of Law Examiners, 353 U.S. 232 (1957) ..... 4, 5, 16 -18, 26-28

Snyder v. Massachusetts, 291 U.S. 97 (1934) 22, 23

Speiser v. Randall, 357 U.S. 513 (1958) 4, 5, 14, 19, 23, 27, 28

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 19

Taylor v. Louisiana, 370 U.S. 154 (1962) 26

Thompson v. City of Louisville, 362 U.S. 199 (1960) 26, 27

Tot v. United States, 319 U.S. 463 (1943) 23

Vachon v. New Hampshire, 414 U.S. 478 (1974) 26

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 27

Winship, In Re, 397 U.S. 358 (1970) 21

Oregon Cases:

Alpert, In Re, 269 Or. 365, 692 P.2d 592 (1984) 2

Chambers, In Re, 292 Or. 670, 642 P.2d 286 (1988) 2

Easton, In Re, 298 Or. 365, 692 P.2d 592 (1984) 2

Fine, In Re, 303 Or. 314, 736 P.2d 183 (1987) 7

Parker, In Re, 314 Or. 143, _ P.2d _ (1992) ..... 1, 3 - 5, 16

Rowell, In Re, 305 Or. 670, 642 P.2d 286 (1988) 2

Steffen, In Re, 279 Or. 313, 567 P.2d (1977)
..... 4, 7, 12, 24, 25

Constitution, Statutes, and Rules:

United States Constitution:

Article IV, Section 2 19
First Amendment 19, 28
Fifth Amendment 17
Fourteenth Amendment
.....2, 4, 5, 7, 14, 15, 17, 18, 21 - 23, 25 - 29

Oregon Statutes and Rules (Text at Appendix 1A):

ORS [Oregon Revised Statutes] 9.220 (2) 2, 16
ORS 9.527 (1) 11, 24
ORS 162.365 24

Petitioner Robert Roosevelt Parker, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oregon, entered on January 25, 1993, in proceedings there captioned *In the Matter of the Application of Robert Roosevelt Parker, Jr., for Admission to the Practice of Law in Oregon*, No. SC S38473.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 314 Or. 143 (1992), and reproduced, as originally issued, in the Appendix herein (App. 3). The Recommendation of the Oregon Board of Law Examiners (of which the opinion below was an affirmance) is reproduced, as originally issued, in the Appendix herein (App. 2).

JURISDICTION

The opinion and decision of the Oregon Supreme Court reviewing the decision of the Oregon State Board of Bar Examiners (BBX) recommending that petitioner, Robert Roosevelt Parker, Jr., not be admitted to the Oregon State Bar was filed on August 20, 1992. The Oregon Supreme Court therein held: "Admission to the Oregon State Bar denied." At that time no judgment was entered. Pursuant to Rule 9.25 of the Oregon Rules of Appellate Procedure (printed in App. 1A) petitioner filed a Petition for Reconsideration of the Oregon Supreme Court's decision of August 20, 1992 (App 4). On November 24, 1992 the Supreme Court issued (but did not enter) an Order Denying Reconsideration (App. 4A). On the same day the Oregon Supreme Court issued an "Order Allowing Costs and Disbursements" to the BBX, as prevailing party. On January 25, 1993, following time restrictions imposed by state law (see App. 1A), on reverse sides of the single piece of paper, the Oregon Supreme Court for the first time entered judgment of both its decision herein of August 20, 1992 and the costs Order of November 24, 1992.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(a), and is grounded in the respondent state's violations herein of the Due Process Clause and the Equal Protection Clause of the 14th Amendment of the United States Constitution in a context that presents no independent and adequate state ground.

STATEMENT

This is a controversy about the refusal of the Supreme Court of the State of Oregon to admit petitioner, Robert Roosevelt Parker, Jr. to the Oregon State Bar, and his contention that this refusal violates his right to Due Process of Law and Equal Protection of the Laws under the Fourteenth Amendment of the United States Constitution.

Petitioner has passed the State bar examination, and it is common ground that the sole legal reasons given for his exclusion are (1) that he has not sustained a statutory burden to prove that he "[I]s a person of good moral character and fit to practice law" as specified by statute, ORS 9.220(2)(a). (App. 1A), and (2) that he has not established this by "clear and convincing evidence", Rules Regulating Admission 12.10(6). (App. 1A.)

The brief of the Oregon State Bar to the Oregon Supreme Court in the proceeding below stressed the further exacting burdens that the Oregon Supreme Court has placed upon bar applicants: "Applicant must prove he is of good moral character by clear and convincing evidence." *In Re Rowell*, 305 Or. 584, 588, 754 P.2d 905 (1988). The clear and convincing standard requires Applicant to show that it is 'highly probable' that he has good moral character. *In Re Chambers*, 292 Or. 670, 672, 642 P.2d 286 (1988). 'Doubt of consequence, of necessity, must be resolved in favor of the public's protection.' *In Re Easton*, 298 Or. 365, 368, 692 P.2d 592 (1984), citing *In Re Alpert*, 269 Or. 508, 518, 525 P.2d 1042 (1974)." Oregon State

Bar Brief in No. SC S38473 (the designation of this case in the Oregon Supreme Court), pp. 5-6.

The procedural history of this case is brief and relatively uncontroversial. After evidentiary hearings before the Oregon State Board of Bar Examiners (BBX) on May 17 and June 10, 1991, and summary argument on July 19, 1991, 10 participating BBX members voted to recommend against petitioner Parker's admission to practice, and 3 members recommended petitioner's admission to practice. On September 12, 1991, the BBX filed with the Supreme Court of the State of Oregon its "Recommendation" that petitioner's application to the practice of law in Oregon be denied. (App. 2). Applicant Parker filed a timely "Petition for Review" in the Supreme Court of Oregon, which allowed this Petition to *de novo* review on the BBX hearing record by Order dated October 8, 1991. The BBX record was filed on October 29, 1991. Applicant filed his brief on March 2, 1992, and the Oregon State Bar filed its brief on March 30, 1992. The Oregon Supreme Court heard oral argument on May 5, 1992, and on August 20, 1992 handed down its Per Curiam decision (cited as *In Re Parker*, 314 Or. 143 (1992)). (App. 3).

On October 22, 1992 applicant Parker filed with the Oregon Supreme Court his Petition for Reconsideration (App. 4) of the August 20, 1992 decision. On November 24, 1992 the Oregon Supreme Court denied the Petition for Reconsideration (App. 4A), and also issued an "Order Allowing Costs and Disbursements to the Prevailing Party." According to Rule 14.05 (3)(b)(ii) this was the first date when the State Court Administrator could have entered judgment ("Appellate Judgment) in SC S38473, the August 20, 1992 admission rejection decision. However, the Administrator did not enter that judgment until January 25, 1993 (App. 5). On the reverse side of the single sheet entered against petitioner on January 25, 1993

was the "other" "Appellate Judgment", for "costs and disbursements". (App. 5).

PROPERLY RAISED FEDERAL QUESTIONS

Question Presented I: The generalized "due process" issue with respect to state denials of bar admissions, as developed in *Schware v. Board of Law Examiners*, 353 U.S. 232, 239 (1957) (and, we may presume, its successor cases) was expressly dealt with by the Oregon Supreme Court in its opinion in *In Re Parker*, 314 Or. 143, 152 n.3 (1992). App. 3. It was returned to by petitioner in his brief in support of his Petition for Reconsideration, at pp. 3-5. App. 4.

Question Presented II: The Due Process and Equal Protection issues in response to the Oregon Supreme Court's omitting treatment of *In Re Steffen*, 279 Or. 313, 567 P.2d 544 (1977) in its opinion in *In Re Parker*, 314 Or. 143 (1992) were properly raised by petitioner in his Petition for Reconsideration at pp. 2-3. It was the first time he could possibly raise them, since he could not have anticipated them earlier. See *Herndon v. Georgia*, 295 U.S. 441 (1935).

Question Presented III: The particular Due Process element here in petitioner's allegation that the opinion and decision of the Oregon Supreme Court in *In Re Parker*, 314 Or. 143 (1992) violated the Due Process Clause of the Fourteenth Amendment is that petitioner was deprived of bar admission without any evidence in the record. It was properly raised by petitioner in his Petition for Reconsideration, pp. 3-7 since clearly he could not have anticipated that the Oregon Supreme Court would rely entirely on the "impersonation" issue, and point to *no* "evidence" in the record to support it.

Question Presented IV: Petitioner's particular reliance here on *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) derives from the Oregon

Supreme Court's extraordinary deviations elsewhere in its opinion (in *In Re Parker,* 314 Or. 143 (1992)) from its expressed compliance therein with the *Schware* (1957) line of cases (see I, above). These deviations (appropriately) were noted by petitioner in the Petition for Reconsideration, especially at p. 8, and they reflect a particular unfamiliarity of the respondent with *Speiser v. Randall,* a significant case decided only one Supreme Court Term after *Schware.*

Question Presented V: Petitioner's allegation here is that the Supreme Court of Oregon violated Due Process of law under the Fourteenth Amendment by applying "clear and convincing evidence" as the standard of proof that measured petitioner's burden of adequately proving his "good moral character" to achieve admission to the Oregon state bar. The Oregon Supreme Court expressly passed on this question in its opinion below. (App. 3, note 1).

In each instance above, we recall that "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it" (*Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct.1709, 1711, 23 L.Ed. 2d 274 (1969), as effectively did the Oregon Supreme Court in its opinion below. See the recent gathering of authorities to this effect in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482-3, n.16, 103 S.Ct. 1303, 1315, n. 16 (1983)). In addition, there was substantial identification of these questions in petitioner's Petition for Reconsideration. (App. 4, pp. 1,3,4,7) One of its peculiar functions in the Oregon appellate system is to give the Oregon Supreme Court an opportunity to consider federal (and other) questions, many of which (as here) could not have been anticipated until its *first* judicial opinion in a case had created the question. See *Raley v. Ohio,* 360 U.S. 423, 436-437, 79 S.Ct. 1257, 1265, 3 L.Ed. 2d 1344 (1959) and *Cardinale v. Louisiana,* 394 U.S., 439, 89 S.Ct. 1161, 1163, 22 L.Ed. 2d 398 (1969).

The issues in this case are clear, but the resolution hardly that. The Oregon Supreme Court opinion found clarity where even a Board member thought there was none. One wonders when the Supreme Court discards all items except "impersonation", which one side argues consists in two events, not one. The court's opinion is preoccupied with setting out the "facts" as the writer of the Per Curiam saw them. In the next section ("Reasons For Granting the Writ") petitioner will argue that one can read the "facts" in the opinion very carefully and conclude that there is "no evidence", but mere conjecture. Two very thin components have to be joined to create a shaky whole of "impersonation" over the long distance telephone. (Witness Thomas barges in without knocking and witness Bermudez from a bank in Seattle without voice-perception training is sure that only one male voice, not two, held him in conversation — about a $500 credit card.) (See App. 3).

In this posture the temptation is to offer great quantities of dialog. At first petitioner planned seven pages of testimony in the petition. Now they are in the Appendix. They are basically from petitioner's side — himself, and his sponsor, the supportive Senator Jim Hill. Judicial notice tells us that he is no longer Senator Hill, having been elected state-wide the State Treasurer last November. Their account is in App. 6, all from the Transcript (Tr.) of the two days of testimonial hearings. In *this* "Statement", however, is a section of testimony totally ignored by the Per Curiam opinion — that of lawyer witnesses, the seven of nine lawyers who spoke favorably of petitioner.

One thought stands out in squeezing dry this transcript: what a horrible plight for the applicant in this case, to have assigned to him both the burden of proof, and the need to "prove" by "clear and convincing evidence."

For reasons developed elsewhere in this petition, it is the contention of petitioner that the Oregon Supreme

Court's overlooking of the very evident *Steffen* case (App. 7) raises other questions of Due Process and Equal Protection. In the present context it serves to underscore the constitutional inadequacy of the Oregon Court's proferred justification for excluding petitioner from the Oregon Bar.

PETITIONER'S STRONG LAWYER CHARACTER SUPPORT

The Oregon State Bar brief in the Oregon Supreme Court cited an Oregon case (*In Re Fine*, 303 Or. 314, 736 P.2d 183 (1987)) to the effect that character testimony is not dispositive on the issue of an applicant's good moral character. Petitioner takes no issue with this statement. He does, however, insist that the Supreme Court in his case seems to extend the *Fine* suggestion to making character testimony irrelevant to the equation of "good moral character". Especially where, as here, the showing adverse to the applicant is palpably thin, it certainly violates Due Process of Law to categorically exclude from the equation of "good moral character" such a reliable source of evidence as the collective opinion of outstanding members of the bar.

Of the twelve witnesses at the State Bar hearing, besides petitioner, 10 were lawyers. Two of these lawyers had represented clients in heated litigation with petitioner. They reported unfavorably to petitioner on the character question. A third lawyer had represented Parker previously (pro bono), and his partner was repesenting petitioner in the bar admission case (again pro bono). His historical testimony was appropriately favorable to petitioner. However, he did not even approach formally testifying on the character issue. The remaining 7 lawyers, experienced members of the bar, all favored petitioner's admission to the bar, testifying for him on the issue of "good moral character." The alphabetical summary below

charts their experience and their testimony on the character issue:

1. **Keith Burns** had been a member of the bar since 1958. He had served in the Oregon House and Senate, as executive assistant to the Governor, clerk of the United States District Court, and in law practice since 1967 as a private practitioner. He had been president of the Oregon bar, and was serving as a delegate to the American Bar Association. He stated that "about half my income comes from lobbying", and that during the legislative session he spent "90% of my time down there". He knew petitioner as the administrator of Senator Jim Hill's committee. He never had "reason to believe that he was using his position inappropriately." Mr. Burns commented on certain allegations that had been made: "overuse of telephone for long distance calls", "getting his telephone hooked up without having to put a deposit". "I would say he used poor judgment and that's the greatest thing that would concern me... And I doubt — I'm confident that he would never do it again." [Tr. 196-7]. Mr. Burns responded to a request for "an opinion about his character and about his ethical capacity to practice law in this state":

> "Except for those particular allegations of which were totally different from my own experience in the same situations, I have no question about his integrity, [nor] any hesitancy to recommend him or hesitancy to employ him as long as he was capable of doing the job I had and I had the job he needed to have." [Tr. 195]

In response to questions Mr. Burns probed the "impersonation" issue with the insight of a senior attorney. These passages are preserved in the Appendix 6 at Tr. 212-214.

2. **Senator Jim Hill.** Senator Hill throughout the hearings made known his strong support for petitioner,

and many of those passages have already been noted. (App. 6). He had pointed pronouncements on the "good moral character" issue:

> "So I as a member of the Bar myself, [you] want to have people who are members of the Bar who are proper character." [Tr. 26]
>
> "But, yes, I do feel that he is fit to practice law and hopefully I think that all of these events will certainly make him a better lawyer than he otherwise would have been and a better lawyer than maybe most people would be under ordinary circumstances because he's been through it and he knows what can happen if you get into trouble real or unreal." [Tr. 25] Fuller statement from Tr. 24-25 in App. 6.

3. **Luther Jensen.** A current State Assistant Attorney General at the time of the hearing, Mr. Jensen had known petitioner for two years. He had been on the other side of petitioner in cases, and the settlements thereof. He would have been a willing reference for petitioner seeking a job, but was never asked. "I have no personal knowledge of any of the facts of the matters when Bob was working for the senate. But . . . it is my best judgment that it is no longer a factor to be considered today upon his application for admission and would commend him to you."

4. **Ivan Karmel.** Portland attorney, Ivan Karmel, testified that he believed petitioner [Applicant] would do a good job as a member of the bar. In the course of his testimony he stated "I think he does have that, the character necessary to practice law." [Tr. 45] Developing the point he further stated that he believed Applicant "would have the sensitivity to serve some of the people who are less fortunate than some of the rest of us [,] who are at this point underserved by the legal community and I think he would do that." [Tr. 68]

5. **Harold Resteiner.** A former (1965-1986) probate judge in Flint, Michigan, and now a practicing lawyer there, Harold Resteiner testified that he first met the Applicant some 20 years earlier. At that time when the Applicant came into the juvenile court where Resteiner was a sitting judge with "problems of running away from home and not being able to adjust at home." [Tr. 313] He was impressed with Applicant at that time but felt that he "probably needed some direction." He kept in touch with the Applicant over the years and visited with him in Flint "from time to time." Asked whether, in his opinion, applicant "possesses the requisite good moral character and fitness to practice law," Judge Resteiner testified that applicant "is a very credible individual who could be a benefit to the Bar." [Tr. 314]

6. **Michael J. Scott.** From February 1991 until the time of the hearing petitioner worked in the law office in which Mr. Scott was a partner. Mr. Scott's testimony was notably personal but he capped it with an unconditional ethical endorsement of Applicant's admission "without condition to the practice of law." [Tr. 136-7] The personal part is unique, and merits recall as one man's focus of another: "If I have to classify, Mr. Parker is poor." [Tr. 138]

> ". . . I met a person who was different than what I read about in the paper. I met a person who was different than what my perception was of him . . . And we have come a long way since February, both me as a person. I'm a white Republican suburban guy. And Mr. Parker comes from a different, a different culture and a different background. And we are learning a little bit about each other . . . And as we have gone through that process Mr. Parker has indicated to me, from what I have seen, that there is nothing that I could tell you that says I do not think he should ethically ["not" in Tr. here, an

> obvious mistake] be admitted to the practice of law." [Tr. 127-8]
>
> " . . . I'm kind of disappointed perhaps at other members of the Bar, other folks hadn't allowed Mr. Parker the opportunity to succeed or fail on his own and all my firm did was to give Bob Parker the chance to succeed or fail on his own." [Tr. 144]

7. **Steve Wynne.** Mr. Wynne was another Portland attorney. He testified that he knew Applicant [petitioner] as a client of his law firm when Applicant was interested in attempting to start his own business, and also from Applicant's work with the Senate Business and Finance Committee for which Applicant worked during the 1987 legislative session. [Tr. 215] When asked in direct examination whether he had an opinion for the Board about whether Applicant "possesses the good moral character and fitness to practice law in our state", Mr. Wynne testified: "Based upon my dealings with him, which as I have indicated to you arose in a context where he certainly had plenty of opportunity to kind of step over the ethical line, I found him to be an ethical, honest guy who I think exhibited good moral character."

Of recurring interest is that Oregon statutory law (ORS 9.480(1) (now ORS 9.527.(1)) provides that the Supreme Court may disbar or otherwise discipline a member of the bar when "he has committed an act or carried on a course of conduct of such nature that, if he were applying for admission to the bar, his application should be denied." (ORS 9.480(1) In *In Re Ruffalo,* 390 U.S. 544 (1968) the Supreme Court ruled that the Court of Appeals had overreached itself in disbarring an attorney under a standard of "conduct unbecoming a member of the bar of the court." In its opinion denying petitioner admission to the bar of Oregon, the Oregon Supreme Court cited with apparent approval the concurring

opinion of Justice White in *Ruffalo*. We, too, think that this opinion sheds light on the proper decision of the one possible issue that remains in the present case as to whether petitioner "Is a person of good moral character and fit to practice law."

The Oregon Supreme Court in *In Re Steffen*, 279 Or. 313, 567 P.2d 544 (1977) was discussing an isolated "impersonation" in a disciplinary context when it admonished its Review Board with reversing language:

> "It is the court's conclusion, taking into consideration what it thinks it knows of human reactions in similar circumstances, that the accused's conduct, while improper, does not raise to the dignity of requiring a formal reprimand by this court." (279 Or. at 317).

The drastically different approach to petitioner in this case clearly raises the due process and equal protection issues discussed below.

The Supreme Court decided *In Re Ruffalo, supra,* as a violation of procedural due process for absence of fair notice, identifying the bar disciplinary proceedings as "adversary proceedings of a quasi-criminal nature" (390 U.S. at 555-6 (1968). Justice White, concurring, however, chose not to decide this federal case on constitutional grounds but to decide a difficult ethical question as a matter of federal common law. His language seems to provide a standard relevant, as well, to considerations of due process; and to highlight the distorting possibilities of burdening petitioner with the burden of proof:

> "The appraisal of petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question. I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the ba-

> sis of a determination after the fact that conduct is unethical if reasonable attorneys would differ in appraising the propriety of that conduct."

Four different constitutional variations of Due Process are cited in the five Questions Presented. The alleged Equal Protection violation is tinged with racial implications. Two lawyer participants in the process dropped such hints in a possibly guileless way. Michael Scott identified himself as a "white Republican suburban guy" (Tr. 128) as a witness for petitioner. In a legal discussion with Board members about standards of proof, Forrest N. Rieke, a *pro bono* attorney, commented: "The context of the reason why we are even having this conversation whereas I as a white Anglo the time I did it didn't have this conversation, having had a number of kind of interesting political episodes in my life prior to my becoming a member of the Bar . . . . " (Tr. 361-362)

Associate Justice Peterson of the Supreme Court, is Chair of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System. His recent comment "after thinking back over the months of hearings" also speaks to the environment: "I had thought that overt racism was greatly reduced in our society. I am no longer convinced of that . . . I said to myself, 'I wouldn't trade places with a Native American or a black person for anything.' They undergo discrimination every day of their lives."*

Petitioner does not urge the Supreme Court to retry his case. He does urge the timeliness of a remand for a new hearing, that assures a proper burden of proof, a reasonable standard of proof, and a decision based on rational legal evidence, not pure opinion.

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* Grund, *Does the System Work for Minorities?*, Oregon State Bar Journal, January, 1993.

REASONS FOR GRANTING THE WRIT

I. THE "BURDEN OF PROOF" IS OF PARAMOUNT CONCERN TO DUE PROCESS IN BAR ADMISSION CASES.

The decision below violates the Fourteenth Amendment guarantee of Due Process of Law in several respects. Petitioner gives particular stress to the violence done to Due Process by Oregon's placing the "burden of proof" of good character on the applicant. In what some see here as a close credibility question, others see as an unfair obstacle block penalizing particularly non-traditional candidates who aspire to participate in the United States legal system. At this time when there is a glimmer of public recognition that broader coverage at the bar is needed, and "Due", petitioner puts the "burden of proof" atop his reasons urging the Supreme Court to grant this writ.

By placing the burden of proof of having a "good moral character" on the applicant as a condition of admission, with the added requirement that the applicant sustain this burden by "clear and convincing evidence." The Oregon Supreme Court erroneously held in this case that these requirements meet the standards of Due Process of Law of the Fourteenth Amendment of the United States Constitution as pronounced by this Court.

It is arguable that this important question of the appropriate burden of proof of good character in a bar admission case has not been settled by this Court. In some cases (discussed below) the Court has tacitly tolerated the burden on some defendants. But these instances remain in a tension with *Speiser v. Randall*, 357 U.S. 513 (1958), which is treated in IV, below. Petitioner argues that this case furnishes an appropriate occasion for the Court to settle the rule that, he contends, is implicit in the currently applicable Due Process case law of this Court.

As the decision below (App. 7) points out, Oregon identifies its rules for admission to the bar with its rules for discipline of its attorneys. (App. 1A) Petitioner has not located nor compiled recent national statistics as to how many other states combine these functions, or otherwise impose the burden of proof of good character on their aspirants for bar admission. However, two American Bar Association studies of disciplinary procedures are suggestive of the national picture: Q. 72 of the *Survey of Lawyer Disciplinary Procedures in the United States* (1984) asks: "Do the rules provide that the burden of proof will be upon counsel?" [State Bar Counsel] .The answers: *Yes* 36 states; *No* 10 states; *Other* 8 states (at pp. 25, 257). *Selected Statutes, Rules and Standards* (1987 ed.), another ABA publication, lists as Standard 8.38: "The burden of proof [for attorney discipline] should be upon [State Bar] Counsel."

A unanimous Supreme Court has held that "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution." *Napue v. Illinois*, 360 U.S. 264 (1959). However, there is that limited number of certiorari petitions chosen each year (about 150, said the Chief Justice in 1987, Rehnquist, *The Supreme Court*, 253 (1987)). An overload of cases that demand exacting record examinations testing Due Process claims could tax the reviewing system.

On the other hand, certiorari granted on the "burden of proof" and "clear and convincing evidence" fairness arguments will combine judicial economy with relief for existent constitutional error. The Oregon Supreme Court has decided this federal question (Due Process) in a way that conflicts with applicable decisions of this Court. Petitioner argues that, on this burden of proof point alone certiorari should be granted.

THE OREGON SUPREME COURT OPINION

The Oregon Supreme Court held a *de novo* review on the administrative record of the recommendation of the Board of Law Examiners that applicant Robert Roosevelt Parker, Jr. be denied his request to be admitted to the practice of law in Oregon. In its *per curiam* opinion denying applicant's request the Supreme Court specifically stated that its entire "disposition of the case is made on the impersonation issue." The Oregon Supreme Court concluded that applicant Parker "cannot prevail on this point, because it was his burden to convince us that the conversation [concerning the alleged impersonation] did *not* occur as she [applicant's co-worker Ms. Kathy Thomas] recounted it." (App. 3)

There are constitutional implications with respect to this issue of burden of proof. The Oregon bar admission statute (ORS 9.220(2)) (App. 1A) provides in part that an applicant must show that he or she "Is a person of good moral character and fit to practice law." (Sec. (a)) The statute next recites that "the lack of good moral character may be established by reference to acts of conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation." (Sec. (b)) This section concludes, the Oregon Supreme Court points out, by requiring "of course, that the disqualifying conduct should be rationally connected to the applicant's fitness to practice law.' thereby covering the same ground as did the Supreme Court of the United States in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). Having set out the pertinent statute, the Court cites the Rules Regulating Admission 12.10(6) in part: "[A]n Applicant must establish by *clear and convincing evidence* that she or he has the requisite character and fitness to practice law." (App. 1A)

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), established once and for all that a person has a "liberty" not to be unfairly excluded from the practice of law, not denied admission to the bar except on a record that justified a finding of unfitness to practice law, and not subjected to qualifications that did not "have a rational connection with the applicant's fitness or capacity to practice law." 353 U.S. at 239. Various bar cases following *Schware* will be discussed below. The point for now is that the "liberty" with respect to law practice has been firm since *Schware*. While continuing to pay its respects to the importance of the work done by state courts and bar officials in keeping up the standards of the bar, in *Schware*, the Court was ready to remedy a miscarriage. There was no need to await an individualized determination that "process is due" as this new wing of constitutional jurisprudence developed following such cases as *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Board of Regents v. Roth*, 408 U.S. 564 (1972). These and other cases led to discrete inquiries whether this or that interest was "property" or "liberty". If so, then "Process is Due", and the inquiry would follow as to "What process?" Alleged injuries from denial of, or separation from, law practice had no need for the two steps. The Court proceeded directly to the evaluation of "What process is due?" So it seemed until *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The Mathews v. Eldridge Analysis

In *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Supreme Court held that the Due Process Clause of the Fifth Amendment did not require an evidentiary hearing prior to the termination of Social Security disability benefit payments. There was no question that the benefit recipient was entitled to Due Process. In what soon became familiar analysis the Court noted that "Process is Due." The issue there, as here, then became "What Process is Due?" In answering this last question, Justice

Powell for a 6-3 Court devised a three-step balancing test to which the Supreme Court has frequently resorted in cases such as this one:

> " . . . [O]ur prior decisions generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail . . . ." (424 U.S. at 334-5, 96 S.Ct. at 903).

In the present case the State of Oregon has ordered that an applicant for admission to law practice has the burden of proving by "clear and convincing evidence" that he or she is a person of "good moral character." There are two questions entwined here: (1) Whether Due Process permits the State to burden this petitioner with affirmatively proving ("burden of proof") his "good moral character", and (2) whether the State may further insist that he do so not by a "preponderance" of the evidence, but by "clear and convincing evidence" ("standard of proof"). Do these Oregon requirements satisfy the constitutional requirements of Due Process? When we turn to the three measurements of the *Mathews v. Eldridge* test it becomes apparent that Oregon has overstepped constitutional limits.

1. The "private interest" affected by Oregon's action.

The Due Process bar cases since *Schware* (1957) amply attest the high regard society and this Court have placed upon an individual's interest in having a fair opportunity to become a lawyer. Other branches of the law echo this

point. The Equal Protection Clause blocked a state bar's exclusion of aliens in *In Re Griffiths*, 413 U.S. 717 (1973). The Privileges and Immunities Clause of Article IV, Section 2 was the Court's vehicle to nullify a state's attempt to exclude out-of-state lawyers in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In *Piper* (per Powell, J.) the Court ruled that, at least under Article IV, Section 2 "the opportunity to practice law should be considered a fundamental right." (470 U.S. at 281, 105 S.Ct. at 1277).

2. "The risk of an erroneous deprivation of such interest through the procedures used, and the value, if any, of substitute procedural safeguards."

A strong case can be made that Oregon's casting the burden of proof on petitioner as to "good moral character", and raising *his* standard of proof to "clear and convincing evidence" violates the First Amendment rights of an applicant engaged in the give-and-take of legislative affairs. With such a burden many future applicants for the bar may hesitate to enjoy to the full this Court's anthem to the First Amendment in *New York Times v. Sullivan*, 376 U.S. 254 (1964): "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (376 U.S. at 270-271, 84 S.Ct. at 721). This recalls criticisms of petitioner that recurred in his bar admission hearing. (Cf. *Speiser v. Randall*, 357 U.S. 513, 520-3, 78 S.Ct. 1332, 1341, 1344 2 L.Ed.2d 1460, 1467, 71, 74-5 (1958): " . . . [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the law-

fulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."

The normalizing of the burden of proof that petitioner requests here will obviously give some relief to future applicants. But pressures will, in some cases, still be great, because of the bar committee's strong weapon derived from the Supreme Court cases that permit fairly unlimited questioning.

3. "The government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail . . . ."

Petitioner has already referred to the high regard and strong interest that this Court has expressed for the work of professional lawyers and judges who are charged with responsiblity for admissions to the bar, and to developing state standards for the conduct of the legal profession (Cf. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 423 (1983)). However, the Court has not hesitated to reject unnecessary state intrusions on legitimate claims that individuals may have to participate in the profession of law. (E.g. *Schware,* supra).

With respect for Justice O'Connor's views in *Medina v. California,* ____U.S. ____, 112 S.Ct. 2572, 2582 (1992), it is difficult to see how normalizing the burden of proof and standard of proof in bar admission cases would present a sufficent fiscal, administrative or professional burden to counterbalance a professional satisfaction in enhanced fairness. It is timely to recall here that Oregon has the same burden of proof and standard of proof for admitted attorneys charged with offenses as for bar applicants. (App. 7) Nor are suggestions persuasive that such a change

would diminish the Bar Admissions Boards' capacity to develop evidence.

This Court's concern for the difficulties of bar admission committees has been remarkable. A close variation of the very phrase under discussion here, "good moral character" has been attacked as "unusually ambiguous." (Black, J., in *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957). In other contexts it would be a prime candidate for the Due Process offense of "void-for-vagueness." In *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971), the centerpiece of the three 1971 bar admission cases, Justice Stewart for a 5-4 Supreme Court upheld a moral character requirement. He said that "long usage" had given "well-defined contours" to the term. (401 U.S. at 159.) In that case this Court also gave the fairly unlimited scope to bar committees' interrogation of bar applicants that the present record reflects. However, in crafting his affirming opinion for the 5-4 Court Justice Stewart noted that no burden of proof was placed upon the bar applicant with respect to a bar admission rule. (401 U.S. at 162-3, 91 S.Ct. at 726).

After Mathews: *The Burden of Proof Cases*

In 1970, before the two-step "Due Process" formula had crystallized came *In Re Winship*, 397 U.S. 358 (1970). In this case the Court held that "proof beyond a reasonable doubt is among the essentials of due process and fair treatment." It was not at once perceived that this case would spark a new interest in burden of proof and standard of proof situations, even outside the criminal area.

Addington v. Texas, 441 U.S. 418 (1979) was an involuntary commitment case, civil in form, but one in which a perceived civil liberty was at stake. *Santosky v. Kramer*, 455 U.S. 745 (1982) concerned the standard of

proof for state termination proceedings of parents' rights in their natural child.

A unanimous Supreme Court in *Addington* identified three distinct standards of proof. The state must generally choose one of these (there were intermediate variations): "beyond a reasonable doubt" (in criminal cases); ("clear and convincing evidence"; or "preponderance of the evidence". Using the *Mathews v. Eldridge* balancing analysis the *Addington* and *Santosky* Courts opted for the intermediate "clear and convincing evidence" test as the *state's* standard of proof in the "significant deprivation of liberty" identified in those cases.

In a few recent cases some Justices have taken new approaches in adjudicating some due process cases and handling the question of burden of proof. *Medina v. California,* ___ U.S. ___, 112 S.Ct. 2572, ___ L.Ed.2d ____ (1992) and *Michael H. v. Gerald D.,* ____ U.S. ____, 109 S.Ct. 3001 (1989). In *Medina* the Court upheld a state statute giving a criminal defendant the burden of proof in his claim to be incompetent to stand trial. In doing so a majority rejected the *Mathews v. Eldridge* test as the mode of analysis in criminal process cases. *Michael H.* had a 5-4 Court with the majority uniting on differing grounds. The most interesting issue was whether plaintiff established a "liberty interest" to challenge the constitutionality of another California statute — this one with respect to post-divorce paternity rights. A plurality of the prevailing combination of Justices (before the retirement of Justices Brennan and Marshall, who dissented) would require for a "liberty" to ground "due process" that it be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." This formulation of Justice Cardozo was first made by him in *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). Was the search for constitutional "liberty" completing a circle?

Not necessarily so. Interestingly, from the standpoint of this petition for certiorari, this *Snyder* formula had been used by the 6-1 majority in *Speiser v. Randall*, 357 U.S. 513 (1958) as a foundation for its "due process" holding against the state's shifting the burden of proof to both criminal defendants and to those asserting a "liberty" interest in civil actions.

The *Speiser* opinion embraced *Snyder* in the following way:

> "It is of course within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1958) . . . ."

Shortly thereafter, the *Speiser* opinion expressed the Supreme Court's conviction that the government's acceptance of the burden of proof was such a longstanding "principle of justice":

> "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. *Tot v. United States* [319 U.S. 463 (1943)] . . . .

"In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof. *Western & A. R. Co. v. Henderson* 279 U.S. 639 (1920); cf. *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910) . . . ."

And the *Speiser* opinion ended in this way:

> "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were

not obliged to take the first step in such a procedure."

II. THE COURT BELOW DENIED PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS BY IGNORING ITS DIRECTLY APPLICABLE PRECEDENT HEREIN

The Oregon Supreme Court, in deciding this case on the Petition to Review of the petitioner herein, and in denying petitioner's application for reconsideration, ignored without comment one of its own cases, *In Re Steffen*, 279 Or. 313, 567 P.2d 544 (1977) (App. 7), which was directly controlling with respect to the single issue upon which the Court rested its decision adverse to petitioner.

1. Recall that the admission standards for applicants and the penal standards for attorneys are the same under Oregon law:

> "The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose that: (1) He has committed an act or carried on a course of conduct of such nature that, if he were applying for admission to the bar, his application should be denied." ORS 9.480(1) (App. 1A, now ORS 9.527).

2. In *Steffen* an attorney was charged with "impersonation" under the impersonation statute relied on by the Oregon Supreme Court in the present case. ORS 162.365 (App. 1A) Although the State Bar Board found that the defendant in *Steffen* had in fact impersonated an assistant district attorney, which he was not, the Oregon Supreme Court reversed the penalty stating:

"The history of the act discloses that a necessary element of the crime is some sort of purported official action in the assumed character. Such action is lacking here since

the accused did no more than to identify himself as a deputy district attorney.

"It is also our opinion that the accused did not violate ORS 9.480(1) since such a single act, standing alone without more, is not sufficiently grievous to refuse admission to practice law to one who has completed four years of college and three years of law school and who has passed the bar . . . .

"It is the court's conclusion, taking into consideration what it thinks it knows of human reactions in similar circumstances, that the accused's conduct, while improper, does not rise to the dignity of requiring a formal reprimand by this court [the Oregon Supreme Court]."

3. The Oregon Supreme Court in this, petitioner's case, did not even mention the *Steffen* case. Petitioner called it to the Court's attention in his Petition for Reconsideration (App. 4). The Supreme Court's Order Denying Reconsideration [App. 4A] read simply: "The court has considered the Petition for Reconsideration and orders that it be denied."

4. In this case there was disputed testimony in which defendant was supported by his supervisor Senator Jim Hill. (App. 6) Assuming an impersonation, as in *Steffen*, the Oregon Supreme Court professed an inability to locate similar Oregon cases in point, and resorted to an elaboration of in-state and out-of-state cases involving conduct far beyond any testimony against the present petitioner. (App. 3).

5. As to Equal Protection, see App. 4, p. 7, no. 1. With respect to Due Process here too, the Oregon Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court, namely the long-standing doctrine of the United States Supreme Court that the "unforeseeable application of that [new] interpretation in the case before us deprived petitioner of due process."

Douglas v. Buder, 412 U.S. 430, 432 (1973). See also *Bouie v. City of Columbia,* 378 U.S. 347 (1964): When an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liablity for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." As the *Douglas* Court insisted, "that same principle of due process is fully applicable in the context of the case before us" (412 U.S. at 432, 93 S.Ct. at 2201) — here, it was stressed as early as *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957) that "a person cannot be prevented from practicing [law] except for valid reasons," that "must have a rational connection with the applicant's fitness or capacity to practice law." (353 U.S. at 239).

III. PETITIONER WAS DENIED DUE PROCESS OF LAW IN BEING EXCLUDED FROM THE BAR WITH "NO EVIDENCE" TO JUSTIFY THE EXCLUSION

The Oregon Supreme Court denied petitioner Due Process of law in rejecting his bar application for lack of "good moral character" without *any* evidence in its opinion charging him with "impersonation" and untruthfulness. (App. 3). Certainly, in view of *Schware* (discussed just above), this Court's "no evidence" rule of *Thompson v. Louisville,* 362 U.S. 199 (1960) and its progeny applies to such a denial of a bar admission: "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." (362 U.S. at 206, per Black, J). See *Garner v. Louisiana,* 368 U.S. 157, 173 (1961), *Taylor v. Louisiana,* 370 U.S. 154, 156 (1962), *Harris v. United States,* 404 U.S. 1232, 1233 (1971), *Douglas v. Buder,* 412 U.S. 430, 432, 93 S.Ct. 2199, 2200 (1973) and *Vachon v. New Hampshire,* 414 U.S. 478, 480 (1974). For an early case

relating unreasonable denial of admission to the bar to procedural due process, see *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 106 (1963).

In the opinion of the Oregon Supreme Court which is challenged here (App. 3) there in *no* evidence in the *Thompson* sense, much less the "rational basis" required by *Schware.* One need but read the extensive recitations of testimony in the opinion itself. One looks in vain for "evidence" constituting the "offense" charged: for time, approximate date, actual witnesses to an event. One finds less even than "mere suspicion", a web of inferences and opinion — but "no evidence." For a judicial treatment of such an extraordinary hard-to-locate judicial event see *United States ex. rel. Exarchou v. Murff,* 265 F.2d 504 (2d Cir. 1959). All this constitutes a vivid inducement for certiorari review: once again the state court has decided a federal question in a way that conflicts with applicable decisions of this Court.

IV. THE OREGON SUPREME COURT IN NOT APPLYING SPEISER V. RANDALL TO SHIFT THE BURDEN OF PROOF HAS DENIED PETITIONER DUE PROCESS OF LAW

By not accommodating Oregon law as to burden of proof to *Speiser v. Randall,* 357 U.S. 513 (1958) in denying bar admission to petitioner, the Oregon Supreme Court has denied petitioner Due Process of Law under the 14th Amendment of the United States Constitution.

Schware and Speiser v. Randall

The first firm statement that the United States Supreme Court was prepared to undertake some oversight of admissions and some other functions of State Bars was in *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). It was a powerful entry, and thereafter, although its incursions have been infrequent, there has been no doubt that when the Court has identified a perceived infringe-

ment of individual rights of aspirants or practitioners it has afforded relief, invariably after certiorari from state courts.

The Court's constitutional tool in *Schware* and thereafter has been the Due Process Clause of the Fourteenth Amendment, and the grievance has been an offense against "Due Process" itself. *Schware* and its companion case in 1957 had involved (without judicial appraisal) bar admissions proceedings in which the burden of proof had been on the bar applicant. However *Speiser v. Randall,* 357 U.S. 513 (1958), the following year, made clear that Due Process would prevent a defendant from being disadvantaged in full enjoyment of the Speech rights embodied in the First and Fourteenth Amendments.

Whether the result is reached by way of the *Mathews v. Eldridge* balancing test, as in Point I, above, or by a direct application of *Speiser v. Randall,* the answer is the same: The Oregon Supreme Court in placing the burden of proof on petitioner is excluding him from membership in the Oregon State Bar and has deprived him of Due Process of Law.

V. THE OREGON SUPREME COURT, IN EXCLUDING PETITIONER FROM THE OREGON STATE BAR WHILE REQUIRING HIM TO ESTABLISH "GOOD MORAL CHARACTER" BY "CLEAR AND CONVINCING EVIDENCE," HAS DEPRIVED HIM OF DUE PROCESS OF LAW

The Oregon statutes concerning admission to the bar, and professional discipline (App. 1A), appear to have given the Oregon Supreme Court extraordinarily wide power to fix bar standards. However, by the sanction of Due Process of Law under the Fourteenth Amendment the United States Supreme Court is empowered to keep in check wanton exercise of that power. In applying a "clear and convincing evidence" test to this unsuccessful

applicant for the Oregon bar, the Oregon Supreme Court has violated petitioner's right to Due Process of Law.

CONCLUSION

For each of the five constitutional violations set out above, petitioner asks this Court for the following relief from the unconstitutional actions of the Oregon Supreme Court:

(1) that the requested petition for certiorari be granted and this case heard;

(2) that, after hearing this case, this Court remand it with instructions to the Oregon Supreme Court to rehear de novo petitioner's application, in accord with the instructions of this Court.

The need for neither lowering the gates to the profession, nor lowering the boom on non-traditional applicants, recommends a relook (and a change) in the burden of proof on applicants to the bar (of Oregon and elsewhere). With the desire that petitioner be permitted to lead the way to a new atmosphere of justice to and among lawyers, this petition is

Respectfully submitted,

Joseph A. Broderick
Attorney for Petitioner
1917 South Lake Shore Drive
Chapel Hill, N.C. 27514

February 1993

APPENDIX

1. United States Constitutional Provisions

1A. Oregon Statutes and Rules

2. Recommendation of Oregon State Bar (BBX)

3. *In Re Parker* (decision below)

4. Petition for Reconsideration

4A. Order Denying Petition for Reconsideration

5. Entered Judgment Herein

6. Excerpts from BBX (Board of Bar Examiners) Hearing Transcript: (Hill, Parker, Burns)

7. *In Re Steffen*, 279 Or. 313, 567 P.2d 544 (1977)

APPENDIX 1

UNITED STATES CONSTITUTIONAL PROVISIONS

APPENDIX 1

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities in the several States....

First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment. No person shall...be deprived of life, liberty, or property, without due process of law....

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 1A

TEXT OF OREGON STATUTES

APPENDIX 1A

TEXT OF OREGON STATUTES

ORS 9.220 *General requirements for admission.* An applicant for admission as attorney must apply to the Supreme Court and show that the applicant: . . . .

(2) (a) Is a person of good moral character and fit to practice law.

(b) For purposes of this section . . . the lack of "good moral character" may be established by reference to acts or conduct that reflect moral turpitude or to acts or conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation. The conduct or acts in question should be rationally connected to the applicant's fitness to practice law.

ORS 9.527 *Grounds for disbarment, suspension or reprimand.* The Supreme Court may disbar, suspend or reprimand a member of the bar wherever, upon proper proceedings for that purpose, it appears to the court that:

(1) The member has committed an act or carried on a course of conduct of such nature that, if the member were applying for admission to the bar, the application should be denied; . . . (1989, c. 1052 #11. Formerly 9.480.)

ORS 9.529 *Status of proceedings relating to discipline, admission or reinstatement.* Bar proceedings relating to discipline, admission and reinstatement are neither civil nor criminal in nature. They are sui generis and within the inherent power of the Supreme Court to control. The grounds for denying any applicant admission or rein-

statement or for the discipline of attorneys set forth in this chapter are not intended to limit or alter the inherent power of the Supreme Court to deny any applicant admission or reinstatement to the bar or to discipline a member of the bar. (1983, c. 618 #3)

ORS 9.536 *Board Decision; Appeal to Supreme Court; Review; Costs . . . .*

(3) When a matter is before the Supreme Court for review, the court shall consider the matter de novo and may adopt, modify or reject the decision of the disciplinary board in whole or in part and thereupon enter an appropriate order.

ORS 9.539 *Application to admission and reinstatement proceedings.* ORS 9.534 and 9.536 apply to admission and reinstatement proceedings to the extent provided in the rules of procedure. However, the Supreme Court shall review the decisions of the disciplinary board in all such matters.

OREGON RULES REGULATING ADMISSION OF ATTORNEYS

1.55 *Applicant must be recommended by a majority of Board of Bar Examiners*

Subject to review by the Supreme Court under Rules 5.05 to 5.15, an applicant may not be admitted to practice law in Oregon unless at least a majority of all non-recused members of the Board of Bar Examiners considers the applicant to be qualified as to the requisite character, fitness, learning and ability.

12.0(6) . . . [A]n applicant must establish by clear and convincing evidence that she or he has the requisite character and fitness to practice law.

OREGON BAR RULES OF PROCEDURE

BR 10.2 *Contested Admission and Reinstatement Proceedings.* Upon the conclusion of a contested reinstatement hearing, the trial panel shall file its written opinion with Disciplinary Counsel and mail a copy to the State Court Administrator. Upon the conclusion of a character review proceeding conducted by the BBX [Board of Bar Examiners], the BBX shall file its decision, accompanied by the record, with the State Court Administrator. Each such admissions and reinstatement matter shall be reviewed by the Supreme Court.

BR 10.6 *Nature of Review.* The court shall consider each matter de novo upon the record and may adopt, modify or reject the decision of the trial panel or the BBX in whole or in part and thereupon enter an appropriate order. If the court's order adopts the decision of the trial panel or the BBX without opinion, the opinion of the trial panel or the BBX shall stand as a statement of the decision of the court in the matter but not as the opinion of the court hearing, the trial panel

162.365 Criminal impersonation

(1) A person commits the crime of criminal impersonation if with intent to obtain a benefit or to injure or defraud another the person falsely impersonates a public servant and does an act in such assumed character.

(2) Criminal impersonation is a Class A misdemeanor. [1971 c.743 §211]

OREGON RULES OF APPELLATE PROCEDURE

RULE 9.25

RECONSIDERATION IN SUPREME COURT

(1) A party seeking reconsideration of a decision of the Supreme Court shall file a petition for reconsideration within 21 days from the date of the decision. The petition shall be in the form of a brief, prepared in conformity with Rule 5.05, insofar as it is applicable. The petition shall include a copy of the court's decision. A petitioner shall identify on the cover which party is the petitioner, the date of the decision, and, if there is an opinion or if there are opinions, the judges who joined therin.

(2) The petitioner shall file the original and 12 copies of the petition with the Administrtor. The original shall show proof of service of 2 copies on every other party to the appeal or review.

(3) No other party shall respond unless the court requests.

(4) The court shall either deny or allow reconsideration. If the court allows reconsideration, the court may reconsider with or without further briefing or oral argument. Reconsideration shall result in affirmance, modification or reversal of the decision that has been reconsidered.

RULE 14.05 APPELLATE JUDGMENT

(1) As used in this rule

(a) "Appellate judgment" means a decision of the Court of Appeals or Supreme Court together with a final order and the seal of the court . . . .

(2) The decision of the Supreme Court or Court of Appeals is effective: . . .

(b) with respect to judicial review of administrative agency proceedings, on the date that the Administrator sends a copy of the appellate judgment to the administrative agency. . . .

(3) The Administrator shall enter the original and send copies of the appellate judgment as soon as practicable after the court has filed its decision; provided that: . . .

(b)(i) with respect to an order of the Supreme Court denying review or a decision of the Supreme Court, the Administrator shall not issue the appellate judgment for a period of 21 days after the order or decision to allow time for a petition for reconsideration under Rule 9.25, or a petition for attorney fees or submission of a statement of costs and disbursements under Rules 13.05 and 13.10.

(ii) If one or more statements of costs and disbursements, petitions for attorney fees or petition for reconsideration are filed, the Administrator shall not issue the appellate judgment until all statements of costs and disbursements, petitions for attorney fees, or petitions for reconsideration are determined by order of the court.

(iii) After entry of the court's order denying a petition for reconsideration . . . the Administrator shall forthwith enter and send copies of the appellate judgment, subject to the prerogative of the court to recall the appellate judgment as the interests of justice require. . . .

APPENDIX 2

RECOMMENDATION OF OREGON STATE BAR (BBX)

APPENDIX 2

IN THE SUPREME COURT
OF THE STATE OF OREGON

In the Matter of the	) RECOMMENDATION OF
Application for	) THE OREGON STATE
Admission of	) BOARD OF BAR
ROBERT ROOSEVELT	) EXAMINERS
PARKER, JR.	)

PRELIMINARY STATEMENT

Robert Roosevelt Parker, Jr., ("Applicant") is a 35-year old graduate of North Carolina Central University Law School in Durham, North Carolina. Applicant applied for admission to the Michigan State Bar in 1986. The District Courts Character and Fitness Committee of the Michigan State Bar recommended against Applicant's admission to law practice in that state in its report dated May 14, 1986 (Ex. 2).

Applicant commenced an appeal of that recommendation by a timely request for hearing to the Michigan State Bar Standing Committee on Character and Fitness. Applicant subsequently withdrew his appeal after moving to the state of Oregon (Ex. 22).

Applicant successfully completed the July, 1990, Oregon Bar Examination. He also achieved a passing score on the Multistate Professional Responsibility Examination, which was reported to Admissions on December 8, 1990.

Applicant was given a summary of the Board's concerns regarding his character and fitness to practice law by letter from John L. Barlow, Chairman, to Applicant's counsel, dated May 14, 1991. A copy of that letter is at-

tached to this document as Exhibit A. The letter followed two interviews with Applicant conducted by members of the Board and extensive discussions and correspondence between Applicant's counsel and Mr. Barlow regarding the matters to be inquired into at hearing.

This matter came for hearing before the full Board of the Oregon State Board of Bar Examiners ("BBX") on May 17 and June 10, 1991. Applicant was represented by Forrest N. Rieke and Leland R. Berger, Attorneys at Law. Applicant was given a full opportunity to present witnesses, to examine and cross-examine witnesses, and to present documentary evidence. Following the presentation of evidence, on July 19, 1991, Mr. Rieke and Mr. Berger presented a summary argument and closing statement to the full Board.

Prior to the hearing, BBX member John Langslet recused himself because his law partner, Jonathan Hoffman, was a scheduled witness. In the course of his law practice, Mr. Langslet had received certain information about litigation involving Applicant and a client of Mr. Langslet's firm.

At the first day of hearing, BBX member Rives Kistler disclosed that he and witness Luther Jensen are both employed by the State Attorney General's office; member Dianne Ericsson disclosed that witness Gene Kennedy had been hired by her law firm approximately six months prior to the hearing; member Robin Parisi disclosed that a member of her firm had defended certain individuals named as defendants in complaints filed by Applicant in state and federal courts; member Mark Comstock disclosed that a former partner in his law firm, Paul Demuniz, had defended Applicant against a misdemeanor complaint

filed by the Marion County District Attorney in 1987; member Roy Pulvers disclosed that he is the staff attorney for the Oregon Supreme Court and that in his employment with the court, he is screened from all matters relating to the BBX, including any review of the BBX's decision in this matter. He would also be screened from any matter relating to Applicant's appeal from the decision of the Oregon Government Ethics Commission ("OGEC").

Each member making the foregoing disclosures stated that they did not have any knowledge of the legal proceedings involving Applicant, but would recuse themselves if Applicant felt that was necessary. During hearing, member Bill Hamilton disclosed that he was a former member and past chairman of the Oregon Government Ethics Commission, but that he had no information about Applicant's case with them (Tr. 353, 11. 5-25). Applicant and his attorneys stated that no recusal was necessary for any of these members.

Exhibits 1 through 17 were received during the two days of hearing. Following the hearing, the Board and Applicant stipulated that Exhibits 18 through 22 would also be included in the record.

RECOMMENDATION

Of the thirteen BBX members participating in the hearing and deliberations, 10 recommend against Applicant's admission to the practice of law in the State of Oregon and 3 members recommend Applicant's admission to practice. Each member recommending admission suggested that Applicant's admission be made conditional upon established and continued oversight of Applicant's management of client funds by another lawyer or group of lawyers admitted to practice in the State of Oregon. Be-

cause a majority of the Board did not recommend admission, specific terms of conditional admission were not explored.

SUMMARY OF FINDINGS

A majority of the Board considered the following incidents to indicate that Applicant lacks good moral character under ORS 9.220 (2) (b) :

1. Applicant's financial history, demonstrating a pattern of incurring large debts at times when he had no reasonable prospect of repaying such debts. Applicant's debts included student loans for his undergraduate and law school education, having principal balances of approximately $33,500, and unpaid child support in excess of $13,000. By the time Applicant filed for bankruptcy on February 6, 1990, he was in default on obligations (including some that had been reduced to judgments) totaling over $140,000 (Ex. 3) .

2. Applicant's lack of candor and failure to provide the whole truth in an affidavit signed January 25, 1988 (Ex. 12), and in a deposition given February 29, 1988 (Ex. 16). Applicant was the defendant in a collection action filed by Household Finance Company.

3. Applicant's incomplete and misleading disclosures on an application for credit from SeaFirst Bank dated January 30, 1987, (Ex. 6) and in applications for financial assistance from the Affirmative Action program of the Oregon State Bar

dated May 25, 1989, October 18, 1989, and April 19, 1990 (Ex. 4).

4. Applicant's failure to appear for several hearings and proceedings and his failure to respond to judgments against him disclosed in the report of the character and Fitness Committee of the State Bar of Michigan (Ex. 2).

5. Applicant's impersonation of State Senator Jim Hill in two telephone conversations occurring on February 12, 1987, and in mid-March, 1987. In one of the cases, Applicant identified himself as State Senator Hill in order to provide employment verification information which would allow him to obtain credit from the inquiring party.

A majority of the Board finds that each of these concerns constitute acts or conduct which cause a reasonable person to have substantial doubts about Applicant's honesty, fairness, and respect for the rights of others and for the laws of the state and the nation. ORS 9.220(2)(b). Each of the findings, and the evidence presented, are discussed in greater detail below.

After reaching its conclusion regarding each of the matters set forth above, the Board turned to the issue of whether Applicant had presented sufficient evidence of rehabilitation to establish his present good moral character. A majority of the Board concluded that Applicant's evidence was insufficient to meet his burden on this issue.

FINDINGS OF FACT

1. ***Applicant's financial history.*** One of the principal concerns of the Board is Applicant's pattern, over a period of several years, of incurring obligations which he had no reasonable prospect of repaying. Although Applicant has had periods of steady employment since completing his law school education, he remains in substantial arrears on a relatively low monthly child support payment ($100) for the child of his first marriage. The arrearages include an eight-year period during which Applicant made only one payment. In addition, Applicant incurred guaranteed student loans and other student loans in the amount of $31,858; he acknowledged at hearing that he made no attempt to repay any of them (Tr. 421, 1. 10-Tr. 422, 1. 13). Applicant has repeatedly opened credit card accounts, quickly incurred debts up to and exceeding the limits for those accounts, and failed to make the required payments. By the time Applicant filed his bankruptcy petition on February 5, 1990, he listed unsecured debts totaling $141,267.29 (Ex. 3, p. 1). Applicant did not seem to be concerned with whether all debts listed by him for discharge in bankruptcy were in fact dischargeable; Applicant attributes his listing of debts which are apparently nondischargeable to his lack of legal counsel in preparing the bankruptcy filing (Tr. 414, 11. 11-15;-Tr. 415, 11. 8-21).

Applicant's history of incurring large debts goes back to his years as an undergraduate at the University of Michigan in 1979 (Ex. 1, p. 2; Ex. 3, p. 12). The debts listed in his bankruptcy schedules encompass obligations incurred in the states of Michigan, Alabama, Oregon, and Washington over the last decade. While Applicant was candid about the magnitude of his debt, he had no choice

but to disclose it because the bankruptcy filing is a matter of public record.

The Board appreciates that a number of the debts incurred by Applicant were for his education, child support, medical bills, and other living expenses. Such expenses are not indicative of someone living an extravagant lifestyle. However, the Board remains troubled by the recurring pattern of financial defaults established by Applicant. For example, Applicant abused credit with at least five separate telephone and long distance services, apparently changing companies each time he exhausted the limits of the previous supplier. The same pattern is evident in Applicant's use of credit cards (Ex. 3, pp. 8-11). There were a number of times when Applicant was gainfully employed but did not pay his outstanding obligations (Tr. 389, 11. 7-14). Such circumstances do not create a compelling hardship beyond Applicant's control, justifying the abysmal credit history he has established.

These repeated defaults alone may be sufficient to warrant Applicant's exclusion from the practice of law in this state until Applicant establishes a history of meeting his obligations as they arise. Applicant's recent discharge of most of his obligations through bankruptcy creates a "clean slate" for Applicant to begin establishing such a pattern.

2. ***Applicant's failure to tell the whole truth in his sworn affidavit and deposition.*** Witness Jonathan Hoffman represented Household Finance Corporation in collection litigation against Applicant, who proceeded *pro se* in the litigation, in 1987 and 1988 (Tr. 146, 11. 4-13). Mr. Hoffman testified that Applicant was pleasant and generally a likable person throughout the litigation. However,

Applicant included frivolous counterclaims, including a claim for $1,000,000 in damages (Tr. 147-149; Tr. 173, 11. 9-20), and made misleading, false, and incomplete statements under oath in a sworn affidavit (Ex. 12) and in his deposition (Ex. 16).

The deposition transcript discloses several instances in which Applicant refused to acknowledge that his signature appeared on several of the loan documents (Ex. 16, pp. 7-9, 11-13). In addition, Applicant disingenuously stated that he was "not familiar with the purported promissory note or retail charge agreement relied upon by plaintiff" because copies of those documents were not attached to a pleading filed by the plaintiff. Applicant also averred that he had never "entered, executed or delivered any contractual document or instrument of any type" to plaintiff or its agent "here in the State of Oregon," ostensibly because Applicant had signed the loan application and retail charge agreement in another state (Ex. 12; Ex. 16, pp. 16-18, 21-22; Tr. 504, 11. 4-9).

During the course of litigation, Mr. Hoffman concluded that Applicant's actions were taken solely to delay conclusion of the litigation and entry of judgment against him, because Applicant felt that entry of a judgment would have an adverse impact upon other litigation in which he was then involved (Tr. 149, 11. 12-18; Tr. 150, 11. 10-19). In fact, Mr. Hoffman stated that Applicant ultimately acknowledged that he acted as he did to delay the resolution of the HFC litigation (Tr. 155, 11. 4-18). Applicant introduced no evidence to rebut the conclusion drawn by this witness.

The Board finds that these actions by Applicant demonstrate a lack of fidelity to the legal system and a lack of respect for the laws of the state and the nation.

3. ***Applicant's Incomplete and misleading disclosures on credit applications.*** In applying for the SeaFirst VISA card, Applicant entered the number "1" in response to a question on length of employment. The Board finds that Applicant did so deliberately in an attempt to mislead SeaFirst into believing that his employment was of one year's duration. In addition, Applicant's list of his debts on the SeaFirst application is materially incomplete (Tr. 482, l. 11-Tr. 483, l. 8).

The Board finds that Applicant deliberately attempted to mislead the Oregon State Bar Affirmative Action program in three applications for Bar examination loans. The application forms are collected as Ex. 4, and consist of an application and financial statement for three separate examinations. Applicant applied for financial assistance to pay tuition for the Bar review course and the Bar examination fee on May 25, 1989, October 18, 1989, and April 19, 1990. In each application, Applicant stated that he had three dependents, including a daughter, Kamilah. At hearing, Applicant admitted that Kamilah is the child of his first marriage for whom he has only sporadically paid child support and has never been part of his household (Tr. 405, 11. 10-16).

A section of the loan application financial statement asks for a listing of debts. In response, Applicant submitted the statement dated May 24, 1989 (Ex. 4, p. 10). While this letter acknowledges substantial debts, it indicates that most arose during a two-year period of unemployment from 1987 to 1989. The statement nowhere discloses the

extent of Applicant's debt, or that roughly two-thirds of the $140,000 listed on the bankruptcy schedules were incurred prior to May, 1987. At hearing, Applicant explained this incomplete disclosure by stating that his written statement was sufficient to establish his need for assistance through the Affirmative Action program (Tr. 519, 1. 17-Tr. 520, 1. 25). This explanation does not respond to the Board's concern that Applicant did not disclose the extent of his obligations for fear that the Affirmative Action program would conclude that he was not a good risk to repay these loans.

In the loan application dated April 19, 1990, Applicant disclosed that he had filed bankruptcy under Chapter 7 in February, 1990 (Ex. 4, p. 8), but again did not disclose the extent of the debt he was discharging in that bankruptcy. Applicant asserts that he discussed his financial circumstances with Rebecca Sweetland of the Affirmative Action program and disclosed to her that he would be discharging the two prior Affirmative Action loans in bankruptcy (Tr. 413, 11. 4-20; Tr. 484, 1. 25-Tr. 485, 1. 6) .

The Board finds that Applicant selectively provided information in all four instances to enhance his application for credit, knowing that full disclosure could result in denial of that credit.

4. ***Applicant's failure to appear for court hearings in Michigan, Maryland, and California., and Applicant's failure to respond to judgments.*** The Michigan State Bar Character and Fitness Report (Ex. 2, pp. 2 through 5) notes the following:

a) From 1977 to 1986, Applicant was cited to appear in the District Courts of several states for

various traffic violations, and failed to appear for each of those matters;

b) Applicant incurred several debts and failed to pay any of these obligations, even after they were reduced to judgment;

c) Between February, 1978, and April, 1986, Applicant made only one payment to the Genesee County Friend of the Court for child support.

Applicant testified that following the report of the State Bar of Michigan Character and Fitness Committee, he commenced an appeal from the Committee's recommendation. However, after finding employment in the state of Oregon in 1987, he decided not to pursue the appeal until and unless he returns to the state of Michigan (Tr. 500, 1. 24-Tr. 501, 1. 2). Applicant then became embroiled in controversy involving his employment with the state legislature from January to May, 1987, ultimately resulting in an investigation and hearing by the Oregon Government Ethics Commission ("OGEC"). Applicant is pursuing an appeal of the OGEC findings and conclusions. Applicant asserts that he "felt it best to resolve all issues raised by those events prior to reapplying for the Michigan Bar" (Ex. 22). He plans to return to Michigan to deal with that report after admission to practice in Oregon (Tr. 453, 11. 16-23).

Although Applicant was made aware, prior to hearing, of the Board's concerns about the matters disclosed in the Michigan State Bar report, there is no evidence that Applicant ever satisfactorily responded to the citations and judgments discussed in that report. The matters reported in paragraphs 10 through 12 of that report form a

part of the pattern of default on financial obligations discussed in part 1 above.

5. ***The alleged impersonations of State Senator Jim Hill.*** Applicant was employed as the Committee Administrator for the Housing, Business and Finance Committee of the Oregon State Senate during the 1987 legislative session. While so employed, Applicant submitted an application for a VISA card to SeaFirst Bank of Seattle, Washington (Ex. 6, p. 1). In the lines of that application requesting the duration of Applicant's employment, Applicant wrote the number to "1". Similarly, in the blank for Applicant's length of residence and his home address, Applicant wrote the number "1."

Witness Renato Bermudez testified that in 1987, he was employed as a loan authorizer in the credit card department of SeaFirst Bank (Tr. 233, 11. 1-9). He reviewed Applicant's application on February 12, 1987. Mr. Bermudez testified that he called the business phone number listed on the application, (503) 378-8117. A male voice answered the phone with the words, "Oregon State Senate" (Tr. 233, 1. 10-Tr. 235, 1. 11). Mr. Bermudez identified himself and requested employment verification information, including length of employment, for Applicant. He was told that Applicant worked full-time for the committee, and that Applicant had been employed for one year. Mr. Bermudez asked for confirmation of Applicant's stated salary and was told that Applicant earned $2,073 per month. Mr. Bermudez then asked the speaker to identify himself, and was told that he was speaking to State Senator Jim Hill. Mr. Bermudez was certain that he spoke only to one person during this conversation (Tr. 245, 1. 22-Tr. 246, 1. 7; Tr. 250, 1. 21-Tr. 251, 1. 5). That person was able to answer all questions promptly and directly (Tr. 249, 11.

5-8). Mr. Bermudez contemporaneously recorded the information given on an employment verification sheet (Tr. 235, l. 12-Tr. 237, l. 25; Ex. 6, p. 2).

Witness Kathy Thomas, who worked in 1987 as a committee assistant in the Business, Housing and Finance Committee, testified that telephone number (503) 378-8117 was for one of two committee lines and did not ring into Senator Hill's office (Tr. 261, 11. 3-12; 270, 11. 19-24). Senator Hill confirmed that in his testimony (Tr. 14, 11. 10-18). Senator Hill also stated that he did not speak to anyone from SeaFirst Bank regarding a credit reference for claimant, but that he had received one call from another person seeking a reference for Applicant (Tr. 112, l. 19-Tr. 113, l. 6).

Kathy Thomas testified to another impersonation incident which she believed occurred during mid-March, 1987. On one occasion in mid-March, 1987, Ms. Thomas entered Applicant's office to review committee minutes with him, and heard him say, upon answering the telephone, "Yes, this is Senator Hill" (Tr. 261, 11. 21-23; Tr. 263, 11. 6-16; Tr. 272, 11. 12-17). She stated that when she confronted Applicant about the incident, he told her not to tell anyone about it because "he could get his ass in big trouble" (Tr. 264, 11. 5-22). Ms. Thomas related the incident to Senator Hill. Applicant denied impersonating Senator Hill; Senator Hill concluded that the matter presented a "her word against his" situation (Tr. 266, l. 11-Tr. 267, l. 15). Senator Hill testified that he could not come to a conclusion one way or the other about the incident (Tr. 117, l. 12-Tr. 118, l. 1; Tr. 119, 11. 8-16).

Senator Hill also testified that more recently, within the six months prior to these proceedings, Applicant told

him that a co-worker had impersonated Senator Hill on the telephone in order to provide an employment reference for Applicant (Tr. 113, 11. 6-17). Senator Hill recalled Applicant saying that the individual literally pulled the telephone from his hand while Applicant was providing information (Tr. 122, 1. 23-Tr. 123, 1. 19). At hearing, Applicant explained that his co-worker volunteered to answer additional questions after Applicant told him the person was calling for an employment reference, and that his co-worker ended the conversation by identifying himself as Senator Hill. Applicant also stated that he would not divulge the name of that individual because he remained employed with the state legislature in some capacity, and Applicant did not wish to cause trouble for that person (Tr. 449, 1. 8-Tr. 450, 1. 2). Applicant asserts that he has repeatedly approached the individual, who continues to ask that his name not be disclosed (Tr. 459, 11. 15-25).

A majority of the Board finds that the testimony of Ms. Thomas and Mr. Bermudez proves that on at least one, and possibly two, occasions, Applicant impersonated, or was present to and complicit with an impersonation of, State Senator Hill for Applicant's benefit. Applicant admits that in one instance, he stood by while the co-worker misrepresented the duration of his employment to SeaFirst Bank (Tr. 443, 1. 5-Tr. 445, 1. 13; Tr. 463, 11. 11-21). These incidents, in and of themselves, might not be sufficient evidence of unsatisfactory character. However, Applicant's subsequent statements about the incidents, ranging from outright denial to stating that another, anonymous person was responsible for at least one of them, indicate that Applicant is not being honest, or fully truthful, in his testimony at hearing. See *In re Easton*, 289 Or 99, 610 P2d 270, 273 (1980).

Applicant suggests that Ms. Thomas' testimony is not credible. He asserts that animosity between Ms. Thomas and Applicant, made it unlikely that Applicant would have "confided" in Ms. Thomas about getting in trouble if anyone found out (Tr. 469, 11. 2-11). Ms. Thomas' testimony was that she entered the office without knocking; Applicant appeared to be surprised when he looked up to see her after identifying himself as State Senator Hill (Tr. 282, 11. 17-21; Tr. 283, 11. 5-6). That testimony does not suggest that Applicant "confided" in Ms. Thomas. Applicant's subsequent request that Ms. Thomas keep the matter confidential was an attempt to protect himself, rather than an indication that he was placing trust in her. The Board did not detect any animus or other basis for Ms. Thomas to misrepresent the event she observed.

It should be noted that a claim that Applicant impersonated Senator Hill was also investigated by the OGEC. OGEC's order and findings have been appealed by Applicant (Tr. 510, 11. 9-23).

OGEC's record was *not* a part of this proceeding, nor were its findings placed for consideration before the Board. The status of Applicant's appeal from the OGEC order also was not considered by the Board.

The factual record for this proceeding was created solely by testimony and exhibits presented directly to the Board. The exhibits before the Board include excerpts of the sworn testimony of witness Kathy Thomas taken in the OGEC proceeding.

The Board has made an independent determination based on the factual record before the board. The Board's findings and conclusions are in no respect predicated on any findings or conclusions made by OGEC. The question

of Applicant's impersonation of Senator Hill is the only matter of concern to the Board that was also a subject of the OGEC proceedings.

EVIDENCE OF REHABILITATION

The Board does not view each item or occurrence discussed in sections 1 through 5 above as separate, isolated matters, but as part of a recurring pattern of behavior reflecting on Applicant's honesty, respect for law, and regard for the rights of others. However, the Board recognizes that while each of those incidents counsels against recommending Applicant's admission to the Bar, Applicant produced some evidence of rehabilitation which must also be considered.

Applicant introduced the testimony of Luther Jensen of the State Attorney General's office and State Senator Jim Hill. Both witnesses testified that the events arising out of the legislature and the OGEC investigation of Applicant taught Applicant important lessons about the proper way to deal with other people. To them, these events created a crucible in which Applicant's character was refined (Tr. 52, 1. 21-Tr. 53, 1. 4).

Mr. Jensen, who represented the various state officials sued by Applicant acting *pro se*, stated that Applicant acted professionally throughout the litigation. He also described a shift in Applicant's attitude from the beginning of the litigation to its conclusion, in that Applicant is now more mature and responsible. He believes that the civil litigation formed an important part of a "growing up" experience for Applicant (Tr. 44, 1. 12-Tr. 45, 1. 2). Applicant eventually dismissed his complaints against state officials in return for payment by the State of $3,000 (Tr. 46, 11. 16-21).

Applicant also introduced testimony from former State Senate President Keith Burns and Attorney Steve Wynne. Both stated that Applicant did not abuse his position with the legislature in 1987 and that in their dealings with him from January to May, 1987, Applicant was in an environment where he could easily have "stepped over the ethical line," but conducted himself appropriately and honestly (Tr. 192, 11. 16-20; Tr. 195, 11. 11-16; Tr. 219, 11. 1-4). Their testimony was limited to events in 1987 and therefore does not directly relate to the issue of Applicant's rehabilitation since that time.

Applicant testified that his financial circumstances required him to "live on the edge" for a number of years and that while he would like to devote more time and attention to rebutting the charges made against him in the OGEC proceedings, he now recognizes that it is time to get on with his life (Tr. 451, 1. 10-Tr. 452, 1. 13; Tr. 479, 11. 1-4). The evidence establishes that there have been several periods during which Applicant has suffered extreme financial duress, and that there has never been a time when he has been financially solvent.

As evidence of his new approach, Applicant offered an order recently submitted to the Genesee County Circuit Court, State of Michigan, arranging for weekly payments of $25 toward the child support arrearages he has incurred over the last 13 years, and ordering withdrawal of the Bench Warrant issued against him (Ex. 17). In addition, Applicant's employer at the time of the hearing, Attorney Michael Scott, testified that Applicant had worked out a loan consolidation payment with him, dedicating a portion of Applicant's monthly salary to repayment of a loan from Mr. Scott's firm (Tr. 131, 11. 7-12; Tr. 132, 11. 7-18). Mr. Scott also encouraged Applicant to work out payment

of child support and post-bankruptcy debt incurred by Applicant (Tr. 132, 1. 19-Tr. 133, 1. 4). Mr. Scott also testified that based upon his discussions with Applicant, Applicant had learned a great deal from his encounters with the legislature, the OGEC and attorneys involved in the various lawsuits brought by Applicant against some of his accusers (Tr. 127-128).

Applicant's former counsel, witness Ivan Karmel, who defended Applicant in certain collection actions, stated that Applicant's behavior should be evaluated in the context of his disadvantaged circumstances (Tr. 66, 1. 16-Tr. 67, 1. 14). Because Applicant "came up the hard way," he has dealt with many individuals and institutions, until recently, from a survival mode of thought and action (Tr. 72, 11. 2-13). Applicant also asserts that his willingness to stay and deal with the OGEC charges and to pursue admission to the Oregon State Bar evidence a change in character indicating his rehabilitation and fitness to practice law (Tr. 472, 1. 14-Tr. 474, 1. 4; Tr. 506, 1. 5-Tr. 507, 1. 15).

The Board acknowledges that, given his beginnings, Applicant has faced a great deal of adversity. We must consider whether there has been substantial change of sufficient duration from the events that gave use to the Board's concerns. In considering that issue, "the length of time without evidence of unsatisfactory character needed to permit the conclusion that the actor is now of good moral character" depends upon many factors. These include Applicant's age, the duration of the unsatisfactory characteristics and the nature of the unacceptable behavior. *In re Rowell*, 305 Or 584, 592, 754 P2d 905, 909 (1988). The Applicant in *Rowell* exhibited a pattern of behavior that showed a maturation process continuing for almost a

decade, with the last objectionable conduct occurring four years prior to the court's consideration of his application.

Here, Applicant's financial problems have persisted for over 13 years. Within the last four years, Applicant has filed incomplete and misleading applications for financial assistance and has been less than honest in the course of litigation, including the giving of sworn testimony in a deposition. His recognition of the gravity of his actions, and his acknowledgment of the need for scrupulous attention to financial obligations appear to be belated responses to imminent consequences, including these character and fitness proceedings.

While Applicant asserts that financial hardship prevented him from meeting his obligations, the Board is not satisfied, on this record, that even if Applicant were able to generate a regular income from the practice of law, that he would deal with his clients and creditors in an honest and straightforward manner. Given the responsibility lawyers bear for client confidences and financial matters, the Board has substantial doubts about Applicant's ability to adequately protect his client's interests and to respect the rights of others. As stated in *In re Easton*, 298 Or 365, 368, 692 P2d 592, 593 (1984), "Doubt of consequence, of necessity, must be decided in favor of the public's protection." (Citing *In re Alpert*, 269 Or 508, 525 P2d 1042 (1974)) As in *Easton*, the Board is concerned by Applicant's failure to honor his financial obligations, even after the gravity of such failures was made known to him by the report of the Michigan State Bar Character and Fitness Committee.

There may well come a time when Applicant, through gainful employment and avoidance of unpayable debt, coupled with a record of honesty and fidelity to the

law, establishes a record which resolves the doubts discussed herein. At this time, the Board cannot recommend his admission to the Oregon State Bar.

John L. Barlow, OSB #81159
Chairman, Oregon State Board of Bar Examiners

APPENDIX 3

IN RE PARKER (DECISION BELOW)

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application of
Robert Roosevelt PARKER, Jr.,
for Admission to the
Practice of Law in Oregon.
(SC S38473)

In Banc

On review of the decision of the Oregon State Board of Bar Examiners recommending applicant not be admitted to the Oregon State Bar.

Argued and submitted May 5, 1992.

Leland R. Berger, of Rieke, Geil & Savage, P.C., Portland, argued the cause and filed the brief for the applicant. With him on the brief were Forrest N. Rieke and Clary A. Hanmer, Certified Law Student, Portland.

Jeffrey D. Sapiro, Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

Admission to the Oregon State Bar denied.

PER CURIAM

The Board of Bar Examiners (Board) recommends denial of applicant's request to be admitted to the practice of law in Oregon. Applicant seeks admission notwith-

standing the Board's action. The case is before us for *de novo* review, ORS 9.536(3), ORS 9.539, and BR 10.6. The issue on review is whether applicant showed that he possesses the statutory qualifications required for admission to practice law. ORS 9.220(2) in part provides that an applicant must show that the applicant:

> "(a) Is a person of good moral character and fit to practice law.
>
> "(b) For purposes of this section * * *, the lack of 'good moral character' may be established by reference to acts or conduct that reflect moral turpitude or to acts or conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation. The conduct or acts in question should be rationally connected to the applicant's fitness to practice law."[1]

After hearing, the Board found multiple reasons for not recommending the applicant for admission. One finding was that during a telephonic interview concerning a credit card application with SeaFirst Bank, applicant either impersonated his employer or was complicit with such an impersonation by a third person. The fact that such an impersonation occurred is not presently disputed. How-

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[1] Rules Regulating Admission 12.10(6) (formerly numbered 7.5) provides in part: "A]n Applicant must establish by clear and convincing evidence that she or he has the requisite character and fitness to practice law."

ever, there was conflicting testimony about who did the impersonation and when.[2]

Applicant's co-worker testified:

"Q. Miss Thomas, was there ever an instance where you saw Mr. Parker impersonate State Senator Jim Hill?

"A. Yes, I did.

"Q. Can you tell us when that happened as best you can recall.

"* * * * *

"A. He was standing up behind his desk and he had the phone in his left hand and he said 'This is' — 'Yes, this is Senator Hill.'

"Q. Are you firm in your recollection that that's what he had to say?

"A. Absolutely. No question about it.

"Q. Was there anybody else in that room?

"A. No, there was not.

"Q. What did you do at that point?

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[2] Because disposition of the case is made on the impersonation issue, we do not reach other issues presented by charges of being in arrears in child support payments, intentionally incurring indebtedness without any ability to repay it, and dissimulation during a deposition about whether it was applicant's signature that appeared on certain documents evidencing debt.

"A. I turned around and I walked — I walked back out and I went back to my desk and waited until he got off the phone and I went back in.

"* * * * *

"Q. And what did you say to him at that point?

"A. I asked him why he would do something like that.

"Q. Did Mr. Parker respond to your question?

"A. Yes, he did.

"Q. What did he say?

"A. He said 'you don't tell anybody about that. * * *' "

Renato Burmudez, who telephoned for SeaFirst Bank seeking employment information about applicant, testified as follows:

"Q. and did the person who answered the phone identify himself at that point?

"A. No, not yet.

"Q. Could you distinguish was it a male or female voice that answered the phone?

"A. It was a male.

"* * * * *

"Q. Did you then ask the caller, the person that you called, to identify himself?

"A. Yes, sir, before we hang up we normally needed to get the name of the person that we were speaking to.

"Q. And to whom were you told you were speaking?

"A. Jim Hill.

"Q. And did that person identify the title for Jim Hill?

"A. I was kind of surprised, too, because he said he was the state senator."

Next, we set out applicant's testimony. Applicant indicated that there were two separate conversations involved (one in mid-February and one in mid-March) and that the co-worker misunderstood the conversation that she overheard.

Concerning the overheard conversation, applicant's testimony was as follows:

"A. I'm familiar with Mrs. Thomas's testimony on that issue.

"* * * * *

"Q. Can you tell me did she ever witness a telephone conversation in which you said anything to that effect?

"A. She witnessed a conversation where she heard me say 'Jim Hill' but it wasn't that she heard me say I was Jim Hill. *Someone called and said who was the chair of the committee, I said 'that would be Senator Hill.' She walked in the door*

as 'Jim Hill' was coming out of my mouth. [Emphasis added.]

"Q. Do you know who that person was that called in?

"A. No, just a general inquiry, I feel [sic fielded?] that a number of those type of calls and I have told numerous people that Jim Hill was the chair of the committee.

"* * * * *

"Q. Did you ever have a conversation with Senator Hill in which he informed you that Kathy Thomas had alleged that you had impersonated him on the telephone?

"A. Yes, sir.

"Q. And can you tell us what you recall of that conversation?

"A. He asked me what happened and I told him.

"Q. But at that time, Mr. Parker, did you tell him that it was someone else?

"A. That was not the conversation of which she had made reference to.

"Q. So the conversation you think he questioned you about was the one in which you simply informed somebody who the chair of the committee was, Jim Hill?

"A. Right.

"* * * * *

"Q. What do you recall that you replied to Senator Hill when he approached you with Kathy Thomas's question?

"A. I told him that Kathy was out of line, that I didn't impersonate him.

"Q. *And did you explain what you had said?*

"A. *Basically that I told whoever had called that he was the chair of the committee."* (Emphasis added.)

Concerning what applicant says was a separate conversation with Mr. Bermudez, the SeaFirst Bank's credit card authorizer, applicant testified:

"Q. Senator Hill also said that when he was talking to you fairly recently or in the early part of '91 or late '90 and you told him about this other person, he said the way you described the incident was that the other person just took the phone and said 'This is Senator Hill.' Do you recall telling that to Senator Hill?

"A. No, I don't recall telling him. Maybe that's his characterization, okay. But I told Jim what I just disclosed to you all with the exception that I disclosed who it was.

"* * * * *

"Q. * * * Did you ever in the context of a credit application represent to someone on the telephone that you were state Senator Jim Hill?

"A. No, sir, I did not.

"* * * * *

"Q. Did you ever have a conversation with Senator Hill about the call from SeaFirst?

"A. Yes.

"Q. When was that?

"A. *He asked me about the SeaFirst situation when it came out in the investigation in May of '87 and I told him that I did not impersonate him.*

"Q. At that point did you tell him that someone else had?

"A. No, I did not.

"Q. Why not?

"A. I limited the conversation to the question, okay. The person that was involved I gave my word in May of '87 that I would not bring him or his family into it. The person still works in the legislative assembly in a very visible position and I think it would perhaps be inappropriate to drag him into it now. I gave him my word that I wouldn't and I haven't.

"* * * * *

"And from my perspective if I say it was John and John says it wasn't me, then we have another screaming match whether it was John or whether it was me. And I have been through too much screaming matches with people. I'm not — I just don't

see it being in my benefit to scream anymore." (Emphasis added.)

Senator Hill testified before the Board twice concerning those conversations with applicant. On the first occasion, he testified in part:

"Q. Senator Hill, were you ever told by anyone that Mr. Parker was impersonating you on the telephone?

"A. Yes. The committee, the committee assistant. * * * had told me she walked into the office, said she heard him telling somebody that he was me. And I confronted him with it *and what he told me was something to the effect that what he was saying in answer to a question was that he worked for Senator Jim Hill and that's why he used my name,* but I just did not know who to call to verify it one way or the other.

"And so basically at that point it was kind of I guess her word against him and I asked him to give me an explanation, which is he said that he was — did not say that he was me. *He said on the phone someone asked him who his — who his boss or who his employer was and he said 'Senator Jim Hill'."* (Emphasis added.)

In Senator Hill's second round of testimony, the following transpired:

"Q. Did Mr. Parker ever tell you that he had witnessed someone else impersonate you in a telephone conversation?

"A. Yes, he did.

"Q. And was that — tell me when that occurred. Was that, about before or after Kathy Thomas came to you and said that she had seen Bob Parker do this?

"A. This was really long after that. I mean this was really not too long. I'm thinking probably some months ago, a few months ago.

"Q. Sometime in 1990 we are talking about?

"A. I think it was probably 1990, yes.

"Q. So during the time that you were conducting your investigation, for lack of a better word, this never came up?

"A. No, it never came up.

"Q. *He simply denied that he impersonated you on the telephone?*

"A. *That's right.*

"* * * * *

"Q. What were the circumstances when Mr. Parker came to you several months ago to tell you that he had witnessed someone else impersonate him?

"A. Impersonate —

"Q. I'm sorry, impersonate you. Thank you.

"A. Well, I had told him all along, and I said the most damaging thing that I thought to me would appear to be the most damaging was this impersonation issue. And I said I didn't know,

because I then had found out about the stuff, the SeaFirst Bank and all that.

"And I said, to me, even from an out—looking objectively from the outside, I said that's the only thing that I see here that is -- that will be troubling for you. * * *

"Q. And it was after you told him that you thought this was one of the most damaging allegations against him?

"A. It was well after that. I mean we are talking about I'm sure it was less than a year ago so we are talking a year."

The foregoing testimony supports several comments bearing on applicant's credibility. First, what applicant told his employer about the conversation overheard by his co-worker is not consistent with what he told the Board under oath. He told the Board that the question that the co-worker heard him answer was, "who is the chairman of the committee?" He said the co-worker overheard him answer that the chairman was Jim Hill, Senator Hill. But he told Senator Hill that the question was one of who his boss was or for whom did he work. Senator Hill's testimony on this point was quite exact. He testified on repeated occasions that applicant told him that the question to which the answer overheard by the co-worker related was one of who employed Mr. Parker, not who was the chair of a committee.

Second, it is clear that the applicant failed to tell Senator Hill for over three years that anyone else impersonated the Senator while in the committee office answering telephone questions concerning extension of credit to an

employee of the legislature. His first omission was when Senator Hill himself conducted an investigation in 1987. Other government agencies also investigated. Applicant denied that he had impersonated Senator Hill. Applicant never disclosed anything about any third-party impersonation until some time in 1990, after Senator Hill advised applicant that his impersonation was the most damaging allegation against him, in the Senator's opinion. By applicant's own admission, he kept the fact of this potentially unlawful conduct a secret even though the subject of impersonating Senator Hill had been inquired about officially and repeatedly. When coupled with the denial of impersonation, this omission amounted to a misstatement of fact.

Applicant still keeps part of the information related to his version of an impersonation of his supervisor a secret, offering two explanations: first, that he is honor-bound to keep it a secret and, second, that if he did disclose who did the impersonating to obtain a credit card for applicant the impersonator would deny having done it, leading to another " 'tis so," " 'tis not" controversy. Neither explanation is consistent with the remainder of applicant's conduct concerning those whose interests have become adverse to his own. If honor's dictates are injected in the situation, it would appear that an equally strong command of loyalty to Senator Hill and the legislature would require disclosure that one long-time legislative employee was willing to and did impersonate a member in a telephone conversation having as its object to obtain credit from a financial institution.

We reject applicant's argument that the evidence associating him with an impersonation rises no further than a "mere suspicion." In addition, we find that the tes-

timony of Ms. Thomas is credible and that the impersonating conversation that she recounts took place. It follows that applicant cannot prevail on this point, because it was his burden to convince us that the conversation did *not* occur as she recounted it.

When statutes regulating the practice of law and the admission by this court of persons to that practice were adopted in 1862, possession of good moral character was one requirement for admission, Deady Civil Code of 1862, § 1003; and conviction of a misdemeanor or felony involving moral turpitude was "conclusive" evidence justifying either removal or suspension by the Supreme Court after admission to practice, *id.* at § 1015. The moral turpitude standard for negating "good moral character" has since been enacted in the admission statute. ORS 9.220(2)(b) provides that:

> "the lack of 'good moral character' may be established by reference to acts or conduct that reflect moral turpitude or to acts or conduct which would cause a reasonable person to have substantial doubts about the individual's honesty * * *."

A criminal prosecution or conviction is not a condition precedent to a decision to disqualify a person from the practice of law based on that person's dishonest conduct. Dishonesty demonstrating moral turpitude may be shown without a specific reference to a criminal law that might have been violated. However, the enactment of a criminal law on the subject, proscribing and punishing certain dishonest conduct, may establish that conduct of that character is of a sufficient nature and gravity to disqualify one

from practice.[3] There is a statute dealing with impersonation of a "public servant" in Oregon. ORS 162.365 provides:

> "(1) A person commits the crime of criminal impersonation if with intent to obtain a benefit or to injure or defraud another the person falsely impersonates a public servant and does an act in such assumed character.
>
> "(2) Criminal impersonation is a Class A misdemeanor."

Definitions for ORS 162.365 are found in ORS 162.005, which provides in part:

> "(1) Pecuniary benefit' means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain * * *.
>
> "(2) Public servant' includes:
>
> "(a) A public officer *or employee of the state* or of any political subdivision thereof or of any governmental instrumentality within the state[.]" (Emphasis added.)

---

[3] The Oregon admission statute, ORS 9.220(2), requires, of course, that the disqualifying conduct "should be rationally connected to the applicant's fitness to practice law," thereby covering the same ground as did the Supreme Court of the United States in *Schware v. Board of Bar Examiners*, 353 US 232, 239, 77 S Ct 752, 1 L Ed 2d 796 (1957).

There are no completely analogous impersonation cases on which to rely.[4] However, impersonation of another to obtain some economic gain has resulted in severe outcomes in a number of cases, including the following: *In re Chambers*, 292 Or 670, 680-81, 642 P2d 286 (1982) (the accused suspended for two years for impersonating an insurance agent); *In re William Vann Cheek*, 246 Or 433, 425 P2d 763 (1967) (the applicant denied admission because he signed name of president of company to two checks and lied about damages to a company automobile).

There are also some cases from other states denying admission for impersonations more directly related to the examination process. In *In re Portnow*, 253 App Div 395, 2 NYS2d 553, 554 (1938), the applicant took the bar examination "by impersonating the Portnow who was graduated at [Columbia Law]." He told the other Portnow about it. "[A]pplicant had admitted to him that he was endeavoring to impersonate him for the purpose of obtaining admittance to the Bar" Id. at 555. In *In re Knight*, 232 Ga 721, 208 SE2d 820, 821 (1974), "the applicant freely admitted that he had contacted two out-of-state law students by telephone, then made a trip out of state and offered them $5,000 if they would successfully take the examination for him."

In *State ex rel v. McMenamin*, 146 Or 60, 65, 29 P2d 520 (1934), the court quoted the rule that conduct of the sort that would justify disbarment would also prevent admission to the bar, stating:

---

[4] *See* Annot, *Admission to Bar — Moral Character*, 64 ALR2d 30 (1957), and Annot, *Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar*, 30 ALR4th 1020 (1984).

"Such conduct as defendant was guilty of would certainly prevent his admission to the bar of this state if consummated prior to the time of the application. Section 31-501, Oregon Code 1930, provides that:

" 'Any member of the bar of this state shall be disbarred by the supreme court, upon proper proceedings for that purpose, whenever it shall appear to that court that his conduct has been such that if he were then applying for admission to the bar his application should be denied.'

" ' "Membership in the bar is a privilege burdened with conditions." Matter of Rouss, supra, 221 N.Y. page 84, 116 N.E. 783. The appellant was received into that ancient fellowship for something more than private gain.' People v. Culkin, 248 N.Y 265 (162 N.E. 487)."

Having said that, the court disbarred McMenamin for dishonesty in borrowing money from a client. The dishonesty consisted of offering security that was inadequate but without disclosing the defects to the lending client, and keeping part of the money himself while causing the client, a widow, to believe that she was loaning all of it to a third party. No criminal prosecution was brought, but the *McMenamin* court did not require prosecution or conviction to support the disbarment. We agree that neither prosecution nor conviction is necessary to permit consideration of dishonest conduct of a person applying for admission.

This court has decided other cases involving moral turpitude. A person who continues to misstate facts about prior dishonest conduct that could constitute a crime and

about his involvement in it, in order to gain admission to practice law, does not show himself to be a credible person and does not establish that he has good moral character required to practice law. *In re Fine*, 303 Or 314, 736 P2d 183 (1987); *see also In re Easton*, 298 Or 365, 372, 692 P2d 592 (1984) (court noted that intentional conduct "to avoid a child support obligation" in a higher monthly amount was of concern when reviewing application for admission to practice); *In re Taylor*, 293 Or 285, 647 P2d 462 (1982) (admission denied based on perjury, theft, bankruptcy to avoid debt, and lack of reformation, quoting *In re Ruffalo*, 390 US 544, 555, 88 S Ct 1222, 1228, 20 L Ed 2d 117, 125 (1968) (White, J., concurring)). The admission statute requires that, to disqualify an applicant, conduct "should be rationally connected to the applicant's fitness to practice law." ORS 9.220(2). Lawyers must be honest. Truth-speaking is requisite in this profession. Applicant's dishonest conduct is related to the question of fitness to practice.

Applicant claims that rehabilitation has occurred after the time of any past disqualifying conduct. We do not find rehabilitation established where, as here, applicant continues to testify under oath in a manner that is contrary to the facts. *See In re Jaffee*, 311 Or 159, 806 P2d 685 (1991) (where the applicant had committed criminal acts related to marijuana, applicant would not be permitted to apply for admission until the passage of the same period of time as would have been the period of suspension for a lawyer in practice committing the same acts).

Admission to the Oregon State Bar denied.

APPENDIX 4

PETITION FOR RECONSIDERATION

APPENDIX 4

PETITION FOR RECONSIDERATION

PRAYER FOR RECONSIDERATION

Robert Roosevelt Parker, Jr., respectfully prays that the Court reconsider and reverse its decision in *In re Parker*, 314 Or. 143, __ P.2d __ (1992).

REASONS FOR RECONSIDERATION AND REVERSAL

Petitioner requests the Court reconsider and reverse its prior decision for the following three reasons:

1. Applicant's position in relation to the finding regarding false impersonation is directly analogous to that of the attorney in *In re Steffen*, 279 Or. 313, 567 P.2d 544 (1977). Reconsideration ought to be allowed to explain how the two cases are distinguishable. Reversal ought to occur because other than the fact that Applicant has not yet been admitted and Steffen was a practicing attorney, the cases are indistinguishable.

2. The Court did not consider whether placing the burden on Applicant to disprove allegations of bad moral character violates his due process rights under the United States Constitution.

3. The Court misinterpreted Senator Jim Hill's testimony and used the erroneous conclusion that Applicant's testimony was inconsistent as a basis for its ruling.

STATEMENT OF FACTS

Procedurally, the case is in this posture: The Oregon State Board of Bar Examiners recommended Applicant be denied admission. Upon *de novo* review, this Court affirmed. Allowing reconsideration and reversing on the issues would result in the admission of Applicant to the Oregon State Bar.

ARGUMENT

A. Applicant's position in relation to the allegation of false impersonation is no different than that of the attorney in *In re Steffen*, and the applicant must be granted admission under that standard.

This Court held that the Applicant did not disprove the allegations of impersonation, and that impersonation constitutes an act of moral turpitude rationally connected to Applicant's fitness to practice law. *In re Parker*, 314 Or. at 151, 155. Whatever involvement Applicant did have in any attempt to impersonate Senator Jim Hill, the act alone is insufficient to deny him admission to the Oregon Bar.

This Court previously construed ORS 162.325 in *In re Steffen, supra*. There, a practicing attorney could not be disbarred or formally reprimanded when, upon being stopped for speeding by a police officer, he lied to the officer and misrepresented that he was presently employed as a deputy district attorney. This Court found that some sort of purported official action in the assumed character was necessary, and there was no official action taken in the act of identifying himself as a deputy district attorney. *In re Steffen*, 279 Or. at 316. Additionally, the alleged misconduct was not such that it could be the subject of any sanc-

tion, civil or criminal, if performed by a non-lawyer. *Id.* This Court further stated that, without more, such an act:

> "[I]s not sufficiently grievous to refuse admission to practice law to one who has completed four years of college and three years of law school and who has passed the bar." *Id.*

Additionally, this Court held that the degree of truth expected from lawyers is *higher* than that of non-lawyers, and that, therefore, conduct which would bar a lawyer from continuing practice need not be as grievous as that which would bar an applicant from being admitted. *In re Steffen* 279 Or. at 317.

If the Court holds to its conclusion that Applicant did tell someone over the telephone he was Senator Hill, Applicant's situation is analogous to that in *Steffen*. Here, Applicant at worst said he was Senator Hill. Alone, this does not represent a violation of ORS 162.365, which requires that any impersonation be done with intent to obtain a benefit or to injure or defraud another. Neither can identification alone, as so held in *Steffen*, constitute an official act taken in the allegedly assumed character.

Here, like *Steffen*, the act is insufficiently grievous to deny admission to Applicant. Because the Court has not chosen to overrule *Steffen*, the holding applies and Applicant must be admitted to the Oregon State Bar under the same standard.

B. Placing the burden to disprove any allegations made against applicant violates his due process rights.

A state cannot exclude a person from the practice of law in a manner or for reasons that contravene the due

process clause of the Fourteenth Amendment to the United States Constitution. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). This amendment prohibits any state from depriving any person of life, liberty or property, without due process of law. The function of the due process clause is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. *Sumner v. Mata, supra*, quoting *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

ORS 9.220(2)(a) provides that an applicant for admission to the Oregon State Bar must show he or she: "Is a person of good moral character." The statute further states that lack of good moral character may be "established by reference to" acts or conduct, rationally connected to the applicant's fitness to practice law, which reflect moral turpitude. BR 7.5 and BR 7.6, which formerly described the burdens on the Applicant and Bar, were deleted by this Court on July 22, 1991. Rule 12.10(6) of the Rules for Admission provides that an Applicant must establish fitness to practice by clear and convincing evidence.

The applicable statute seems to require only that someone "refer to" an act or conduct which might question an applicant's fitness to practice. This Court reads the statute to place the burden of proof on the Applicant not only to show good moral character but to disprove any

allegations made which refer to his character. *In re Parker*, 314 Or. at 151.

Under this reading, an applicant must sustain this burden by either disproving the allegation or admitting the allegation and establishing reformation. This Court did not accept Applicant's reformation argument because it came to the erroneous conclusion that Applicant was testifying inconsistently and lied under oath. (See discussion below.)

Even if this Court's conclusion were correct, leaving the burden to disprove on the applicant denies Applicant his due process rights under the 14th Amendment of the United States Constitution. The Oregon scheme fails to fulfill the function of the due process clause because, by allowing lack of good character to be established by mere reference, it does not instruct the factfinder on the appropriate degree of confidence needed. Rather than indicating the important of the decision affecting a person's right to choose an occupation, the weak standard belies the importance.

The state violated *Schware*, by excluding a person from practicing law for a reason which contravenes the due process clause. Therefore, the decision denying admission must be reconsidered and reversed.

C. Applicant's testimony was consistent.

This Court erroneously found Applicant was inconsistent between what he told his employer, state Senator Jim Hill, and what he told the Trial Board under oath regarding the false impersonation issue.

In relation to the impersonation charged by Ms. Thomas, Applicant testified that he told Senator Hill that the question over the telephone was one of who was the chairman of the committee. App. B2. Senator Hill testified that Applicant told him the question was one of, who was his boss, or who was his employer. App. C2. This Court used this differing testimony about the question to challenge Applicant's credibility.

Without stating its finding explicitly, it appears this Court determined the differing testimony between Applicant and Senator Hill meant Applicant was not describing different events but that Applicant had changed his story concerning the impersonation charged by Ms. Thomas. This Court explicitly stated, however, that the denial of the impersonation, when coupled with the omission, amounts to a misstatement of fact. This Court then used that conclusion to find Applicant did not prevail in his pursuit to disprove the allegation of false impersonation, and that the misstatement was inconsistent with any claim of rehabilitation.

However, Applicant was consistent in his testimony before the Trial Board and in recounting the details to his employer. Applicant was consistent in maintaining to Senator Hill that the first impersonation charged by Kathy Thomas did not occur, and that a second impersonation involving another unnamed individual, and not himself, did occur. Senator Hill testified that Applicant told him the question asked over the phone in the impersonation charged by Ms. Thomas was one of "who was his employer," and affirms now by affidavit appended hereto that this Court misinterpreted his testimony. Instead, he intended to accurately relay what the Applicant told him,

which was that the question was one of who was the chairman of the committee. App. A1-2.

The two events were separate and unrelated, and cannot be read to mean Applicant lied, and then admitted the impersonation. It is true that there was a denial of the impersonation charged by Ms. Thomas, and that there was an omission of an impersonation involving Renato Bermudez and a third party, but because the denial and the omission occurred in two unrelated events, they cannot be equated into one misstatement.

Applicant testified truthfully. He did not testify under oath in a manner that is "contrary to the facts." Rather, the facts demonstrate and the Board of Bar Examiners accurately found that there were two separate events and Applicant was consistent in maintaining that he did not impersonate Senator Hill in one, and that he did not participate in the other. Thus, the conclusion that there was a misstatement is erroneous and cannot support a finding that he did not disprove the impersonation or is not rehabilitated.

REASONS FOR GRANTING RECONSIDERATION

1. Although not briefed by either side, *In re Steffen* is dispositive on the issue presented. Reconsideration is necessary to eradicate the false impression that the only difference between Parker and Steffen is their race.

2. Reconsideration is necessary to ensure that all steps in the Oregon State Bar application process comport with due process standards. The scheme as it exists now denies due process to the Applicant pursuing the occupation of his choice. Furthermore, leaving the burden of

proof with the Applicant allows a factfinder to make findings by an impermissibly low standard.

3. This Court should allow reconsideration to correct its factual findings. The conclusion that Applicant testified inconsistently is unsupported by the record, for in fact, he testified truthfully on two unrelated events with different outcomes. The Court should reconsider whether the conclusion may remain in place to support holdings that Applicant cannot disprove the allegations against him and that he is not now rehabilitated if the allegations are true.

CONCLUSION

More than five years have passed since Ms. Thomas first alleged the impersonation. Applicant demonstrated rehabilitation. Five years is a sufficient length of time. *See, generally, In re Jaffee*, 311 Or. 159, 806 P.2d 685 (1991) (Where the applicant had committed criminal acts related to marijuana, applicant would not be permitted to apply for admission until the passage of the same period of time as would have been the period of suspension for a lawyer in practice committing the same acts). For all the above stated reasons and authorities, Applicant respectfully requests the Court allow his Petition for Reconsideration and reverse its decision denying him admission to the Oregon State Bar.

Respectfully submitted this 22 day of October, 1992.

Rieke, Geil & Savage, P.C.

Forrest N. Rieke, OSB #71148
Of Attorneys for Petitioner

Leland R. Berger, OSB #83020
Of Attorneys for Petitioner

Cheryl Albrecht
Certified Law Student

APPENDIX 4A

ORDER DENYING PETITION FOR RECONSIDERATION

APPENDIX 4A

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of	)	
ROBERT ROOSEVELT	)	
PARKER, JR	)	ORDER DENYING
Petitioner	)	RECONSIDERATION
OREGON STATE BAR	)	SC S38473
Oregon State Bar	)	

The court has considered the Petition for Reconsideration and orders that it be denied.

DATE: November 24, 1992

/s/ _____
WALLACE P. CARSON, JR.
CHIEF JUSTICE

APPENDIX 5

ENTERED JUDGMENT HEREIN

APPENDIX 5

IN THE SUPREME COURT FOR THE STATE OF OREGON

Filed: August 20, 1992

In the Matter of the Application of ROBERT ROOSEVELT PARKER, JR., for Admission to the Practice of Law in Oregon	))))	(SC S38473)

In Banc

On review of the decision of the Oregon State Board of Bar Examiners recommending applicant not be admitted to the Oregon State Bar.

Leland L. Berger, of Rieke, Geil & Savage, P.C., Portland, attorney for the applicant.

Jeffrey D. Sapiro, Disciplinary Counsel, Lake Oswego, attorney for the Oregon State Bar.

PER CURIAM

Admission to the Oregon State Bar denied.

APPELLATE JUDGMENT

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing Party: Oregon State Bar

[ ] No costs allowed.
[X] Costs allowed, payable by: Applicant.

MONEY JUDGMENT

Judgment #1

Creditor: OREGON STATE BAR
Debtor: ROBERT ROOSEVELT PARKER, JR.
Costs: $2,474.00
Attorney Fees —0—
TOTAL: $2,474.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY JUDGMENT

Judgment #2*

Creditor: STATE OF OREGON, JUDICIAL DEPARTMENT
Debtor: ROBERT ROOSEVELT PARKER, JR.
Unpaid filing fee: $25.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*Judgment for unpaid filing fees. ORS 21.605(1)(c).

Appellate Judgment SUPREME COURT
Effective Date: January, 25, 1993 (seal)

APPENDIX 6

EXCERPTS FROM BBX (BOARD OF BAR EXAMINERS) HEARING TRANSCRIPT: (HILL, PARKER, BURNS)

APPENDIX 6

SENATOR JIM HILL

Using his own words, Senator Jim Hill here unfolds the backdrop of the petitioner's embattled course on his way to the Forum. (The page citations are to the transcript of the hearing before the Oregon State Bar Board of Law Examiners on May 17, 1992.)

"I'm state Senator Jim Hill, district 16 in Salem, and I'm also a corporate accounts manager for Mentor Graphics Corporation . . . [Parker] was employed by me in the 1987 session of the Oregon Legislature as my committee administrator for the Business, Housing and Finance Committee which I chaired. [Tr. 3] . . . [H]is job was to manage the administrative aspects of the committee . . . [H]e served for most of the legislative session before a series of events resulted in his voluntarily stepping down as committee administrator.

"Basically we had a bill in our committee called . . . Senate Bill 664 which was termed the Gasoline Dealers Bill of Rights and there was a great deal of controversy over the bill because it dealt with the — I guess the balance of power and the relationship between the major oil companies and the gasoline dealers. The gasoline dealers felt that they were at an extreme disadvantage so they came into the legislature trying to get a bill, a bill of rights.

". . . [W]e had in the senate the votes to pass the bill and the bill eventually did pass. And what I believe happened is that given that they could not stop the bill in the legislative process, part of what [Tr. 4] happened was to stop the bill by interfering with the functioning of the committee . . . [Q. Were there other lobbyists involved in

that issue that were formidable politicians in their own right?] Yes, . . . the lobbyist representing the major oil company was John Burns, former senate president, and the lobbyist representing the jobbers was Jason Boe, also former senate president . . . I think it is safe to say that at least from my conversations with the current senate president, John Kitzhaber, that they had [Tr. 5] talked to him concerning Mr. Parker's conduct. . . . [Tr. 6]

"[Q. [H]ave you reached any conclusion about the significance of those events and whether or not they reflect in your opinion on our client's ability to practice law?]

"A. Well, I guess the point is I wouldn't be here if I felt that Bob Parker was guilty of misconduct . . . I have stood by Bob throughout this matter because I just don't feel that he was treated fairly and I wouldn't be here now if I did not think that he was treated fairly [unfairly] [Tr. 6]

"[Q. Are you saying then from your earlier testimony that Mr. Burns and Mr. Boe went to Senator Kitzhaber and falsely accused Mr. Parker solely to derail 664 [Senate Bill 664, supra]. Or at least . . . .]"

"A. That's the gist of it . . . . [Tr. 120].

"[Q. . . . Is that typical of their behavior?]

"A. Well, I guess the situation is is [sic] that this bill was very important for them to stop, and it certainly is outside of the usual process as a way of stopping a bill, but they wanted the bill stopped very badly." [Tr. 120]

"[Q]: "Tell me a little about a conversation you had with him [Tim Jensen . . . formerly a deputy district attorney for Marion County] regarding my client, Mr. Parker,

and the Oregon charges brought in Marion County that relate to my client. [Tr. 106].

"[A] Well what happened is that when all of this started, the Attorney General was called in to investigate this entire matter. An investigation took place for about two, maybe two to three months and whatever the findings were that they had they turned over to the district attorney of Marion County to see if there were any criminal proceedings involved. [Tr. 107]

"And apparently they went through the process. The grand jury did not indict Mr. Parker for anything, but the district attorney, Marion County district attorney's office, and Tim Jensen was the person working on it, charged Mr. Parker with for [sic] failure to completely fill out a financial statement or something to that effect . . .

"And at one point, Mr. Jensen asked to have a meeting with me, and I went down to the district attorney's office and he reviewed with me everything that was turned over to his office by the Attorney General. And at one point I said, 'Well, you're charging him with this failure to fill out a financial application.'

"And the gist of the conversation was that they felt that Bob Parker was not worthy to practice law and that they were going to file this charge against him and that the main purpose of it, one of the things that they hoped to accomplish would be that he would never practice law in the state of Oregon." [Tr. 106-7]

[Six further pages of "environment" testimony by Senator Hill [Tr. 7-9] are included in the Appendix].

ROBERT R. PARKER, JR.

Midway in his testimony, Robert R. Parker, Jr., the applicant for bar admission, was told by one Board Member, Ms. Gale Patterson: "I don't think it is going to be possible for me to establish whether or not something happened on the phone, whether or not you impersonated Jim Hill. I think it would be important information if we could establish it one way or another about your character, but I don't think from what I have heard in this hearing that I'm going to be able to know that ever one way or the other. So it is a swearing match between you and another witness who was here.

"And what I would like for you to address is given your past history just is there something you could tell me, and perhaps anybody else on this board, that would help us to understand —. . . ." [Tr. 471]

Mr. Parker responded to the invitation:

"I'm not here, you know, feigning to be angelic. Perhaps I should not have even worn a checkered suit today because perhaps everybody thinks that I'm a checkered individual. My past is checkered, but my intentions are very bright and pure.

"All I want to do is have the opportunity to live a normal life like everybody else. I'm an anomaly of sorts. If I had followed the path that was laid down for me I would be a crackhead. I'm not. I'm a high school dropout with a law degree. I have yet to have a steady ongoing employment for a year since law — since undergraduate school. I want to establish that kind of stability. To date I haven't been able to. It has been one thing after another.

"The incident that occurred in the Oregon legislature in '87 was the most recent and perhaps the most profoundly devastating, but other situations had occurred that have brought my — rocked my world as well. I keep getting up. I guess my perception is that every time I move one half step forward, I'm knocked five steps back but I keep getting up.

"If I was the type of person that wanted to abscond on responsibilities, I would not be here today. We're here because Bob Parker kept pushing the ball forward. I'm in Oregon. I came back to Oregon for one reason, just to clear my name. . . . [Tr. 472]

"But having lived through this experience, having had every facet of my life reviewed over and over and over by agency after agency, investigator after investigator, commission and now before this body, I think it is pretty clear that if I had something to hide, I would have kept it hid by hiding myself. I just would not have come forward. I wouldn't have applied for the Bar, I wouldn't have taken it three times, I wouldn't have stayed in there with the ethics commission and force a hearing when they didn't want to have one. I would not have come back to Oregon, and perhaps I would have went back to a name similar to Kareem Abdul Muqsit or to Kareem Simpson or something, anything other than what was if I wanted to hide something . . . ." [Tr. 473]

Petitioner obviously relished the opportunity to answer such a question. But his attorney, lawyer that he was, soon drew him back into the real world. He pressed him for more details about the reluctant colleague who'd "impersonated" Senator Hill:

[Q. Why don't you review for a minute with her whether or not you thought, for instance, that the thing your colleague did was an appropriate thing to do.] [Tr. 474]

A. I think it was inappropriate and I would not —

[Q. Why don't you explain to her why it is you didn't reveal it at the time.]

A. I thought it was a fortuitous incident, okay.

[Q. That's not an answer.]

A. I didn't think it was expected to happen. I certainly didn't expect him to say that he was Jim Hill. When I saw the look on his face, I think he was genuinely surprised that he had found himself in the situation of who am I, did he want to say who he was or what and I just think it was a fortuitous occurrence, I really do. [Tr. 474]

[Q. Tell her why you didn't report it.]

A. Well, it didn't come up until May of '87. The only reason it came up is Kathy says she thought she heard me say I was Jim Hill and that gave the investigators what they wanted to search in my credit and when they searched into my credit there was this situation with SeaFirst Bank . . . It became an issue, things caught fire in the legislature. It was almost like I had political AIDS. And the person didn't want to be involved in what had happened, I gave them [sic] my word that I wouldn't involve him and I still haven't. I would not condone such conduct ever again in the future. I take responsibility for it happening on my behalf." [Tr. 474]

PARKER AND HILL ON "IMPERSONATION"

The Oregon Supreme Court *totally* rested its judgment below on the "impersonation" issue. We may call "Event 1" the occurrence testified to by Ms. Thomas, petitioner's associate. The passage just above [at Tr. 474] dealt with "Event 2", the unreported action of petitioner's colleague (unidentified beyond Parker and Hill). There was no confusion or contradiction in the testimony of either Mr. Parker or Senator Hill as to either "Event". There is a loose connection somewhere when the Oregon Court uses a burden of proof presumption in place of evidence to brand petitioner "dishonest" for "continuing to testify under oath in a manner that is contrary to the facts" — facts that have neither been established or disestablished.

1. **Event 1:** Ms. Thomas charged, and petitioner Parker denied, that petitioner "impersonated" Senator Hill.

Senator Hill, having questioned both Ms. Thomas and Mr. Parker, could not conclusively resolve their testimony, but he resolutely believed petitioner.

The Oregon Supreme Court, on this record, without seeing or hearing the witnesses, and despite Senator Hill's and Member Gale Simpson's inability to rationally resolve the Parker-Thomas differences, found

(a) "that the testimony of Ms. Thomas is credible and that the impersonating conversation took place";

(b) "It follows that applicant [petitioner Parker] cannot prevail on this point, because it was his burden to convince us that the conversation did *not* occur as she recounted it."

(c) *Therefore,* because "Lawyers must be honest" and "Truth-speaking is requisite in this profession" "Applicant's dishonest conduct is related to the question of fitness to practice." Furthermore,

(d) even rehabilitation would not be available to applicant Parker, five years later, because "applicant continues to testify under oath in a manner that is contrary to the facts."

2. **Event 2:** Again, the testimony of petitioner and Senator Hill is clear, consistent, and in agreement with each other on the evidence they presented, and on their unhappiness at the event.

Petitioner admittedly was present when the colleague took the phone from him, identified himself as Senator Hill, and then verified that Parker was employed by Hill. Petitioner's last discussion of this incident, (reproduced just above [at Tr. 474]), was consistent with what he had testified to before.

Senator Hill was obviously not happy that petitioner, honoring a pledge not to identify the colleague, held off telling even Senator Hill for at least two years. But, when petitioner did identify him to Senator Hill under pledge of secrecy, Senator Hill was satisfied with petitioner's pledge and with the identity of the culprit, and himself abided by petitioner's pledge. He was satisfied that beyond the improper identification, the colleague merely acknowledged that Parker worked for Hill. Moreover, he was not persuaded that Parker had an obligation to be outraged on the spot and snatch the phone out of his colleague's hands.

The Oregon State Bar could obviously not produce evidence that Event 2 never took place, so the Oregon

Supreme Court could not make such a finding. But the Oregon Supreme Court apparently found in the incident *evidence* "bearing on applicant's credibility": Parker's failure to tell Hill sooner, and his continued reservation (apart from Hill) of the colleague's identity. To the Oregon Court these constituted "potentially unlawful conduct", and (when coupled with the denial of impersonation) a "misstatement of fact".

As noted earlier, no reference was made by the Oregon Court to *In Re Steffen*, 279 Or. 313, 567 P.2d 544 (1977). App. 7. In that case an *attorney* identified himself to a traffic police officer as a "deputy district attorney", which he was not. The Oregon Supreme Court ruled "There is no doubt that he lied to the officer and it is a fair inference that the accused hoped to get privileged treatment." The Oregon Supreme Court pointed out that disciplinary standards for an attorney therein was measured by statute [ORS 9.480(1)] according to whether "He has committed an act or carried out a course of conduct of such a nature that, if he were applying for admission to the bar, his application should be denied...." The Oregon Supreme Court reversed the Disciplinary Review Board of the Oregon State Bar, which had found Steffen guilty as charged:

> "It is the court's conclusion, taking into consideration what it thinks it knows of human reactions in similar circumstances, that the accused's conduct, while improper, does not rise to the dignity of requiring a formal reprimand by this court.

The proceeding is dismissed."

REDIRECT EXAMINATION

BY MR. RIEKE:

[Q. Well, if you were able to get to the bottom of it, would that be a fatal finding on your part in terms of whether somebody should be a member of the Bar or not?]

A. Well, if a person said yes, they did it and they made a mistake and they could not say why they went to the trouble to do it or something like that, we all make mistakes, and that wouldn't bother me.

[Q. If the person says I may not have done it but I won't divulge would did and accept responsibility for it, that would take care of it as far as you're concerned with respect to whether or not they should be a member of the Bar?]

A. That would not bother me at all. There are some times when people are just willing to take the heat and feel that they are responsible for it and prefer to take the heat rather than to do the other. And I think we all have to do that. Sometimes in some ways I look in a mirror for most of the problems I have rather than looking at other people.

And I guess I'm not answering your question very directly, but if they take the heat for it, why that's just a responsibility they want to take and not blame somebody else for it. And I can't answer any better than that unless someone wants to drill a little deeper to pull it out of me.

[MR. RIEKE: That's as deep as I'm going.]

EXAMINATION

BY MR. HAMILTON:

[Q. Mr. Burns, Bill Hamilton, and I'm a lay member.]

A. Oh, I remember. I was trying to think who you were.

[Q. It is good to see you again.

A. Yes. I knew your father.

[Q. Thank you.

To go back to somebody wanting to take the heat, I wonder if maybe we have an issue here of good judgment because if you were to know that your whole future is going to be at stake here based on somebody else doing something that you are not going to divulge but you are taking the heat for it and eventually being judged on that, on the allegation that A, it might have been you, or B, why don't you divulge, don't you see something there that needs to be questioned?]

A. Yes, I would want to go into that, and I think I have said that. I would want to inquire about that. It could be that that person felt that they were derelict in not instructing the people in their duties and telling them what they should do and not do and so forth and felt a sense of guilt about that and it probably wouldn't have done the job better and it could have been in that nature. That's what I was thinking of, that type of thing. And it could be that it had been something – for that person it could have been a very traumatic thing at the time that would have caused them so much more damage than

they would anticipate would happen to them, they were willing to carry the load.

[MR. RIEKE: Thank you. We have nothing further.]

APPENDIX 7

IN RE STEFFEN, 279 OR, 313, 567 P2D 544 (1977)

APPENDIX 7

SUBMITTED ON RECORD MAY 9, PROCEEDING DISMISSED AUGUST 9, 1977

IN RE: COMPLAINT AS TO THE CONDUCT OF JEFFREY STEFFEN, *Accused.*

(No. 1320, SC 24824)

567 P2d 544

Member of the State Bar was charged with violation of Disciplinary Rule and violation of statute authorizing discipline whenever an attorney has committed an act or carried on course of conduct of such nature that if he were applying for admission to bar his application should be denied. In reviewing the findings of fact, conclusions and recommendations of Disciplinary Review Board of the Oregon State Bar, the Supreme Court held that action of attorney, stopped for routine traffic violation, in falsely representing to police officer that he was currently a member of district attorney's office, was not a violation of statute and did not warrant formal reprimand.

Proceeding dismissed.

1. **False personation—Impersonation of public servant**

Necessary element of crime of criminal impersonation of a public servant is some sort of purported official action in the assumed character. ORS 162.365.

2. **Attorney and client—Act of false statement to officer not violation of statute authorizing discipline of bar member**

Act of attorney, stopped for routine traffic violation, in falsely stating to police officer that he was currently employed in the district attorney's office, did not violate statute authorizing discipline of member of bar who has committed an act or carried on course of conduct of such nature that if he were applying for admission to bar his application should be denied; such a single act, standing alone, was insufficiently grievous to refuse admission to practice law. ORS 9.480(1).

3. Attorney and client—Act need not be in capacity as lawyer to constitute violation of disciplinary rule

It is not necessary that act with which accused attorney is charged be performed in his capacity as a lawyer in order to constitute a violation of disciplinary rule or that conduct be as grievous as that which would bar him from being admitted to practice. ORS 9.480(1).

4. Attorney and client—Degree of truthfulness expected

Degree of truthfulness expected from a lawyer is higher than that expected from others. ORS 9.480(1).

5. Attorney and client—Action did not require formal reprimand

Action of attorney, stopped for routine traffic violation, in falsely representing to police officer that he was currently a member of district attorney's office, while improper, did not rise to dignity of requiring a formal reprimand. ORS 162.365.

In Banc*

---

* Denecke, Chief Justice, and Tongue, Justice, did not participate in the decision of this case.

Review of the findings of fact, conclusions and recommendations of the Disciplinary Review Board of the Oregon State Bar.

Robert H. Bay and Michael J. Esler, Portland, filed a brief for the Oregon State Bar.

No appearance contra.

PER CURIAM.

Proceeding dismissed.

PER CURIAM.

The accused, a member of the Oregon State Bar, is charged with violation of ORS 9.480(1) and of Disciplinary Rule 1-102(A)(4) under Canon I of the Code of Professional Responsibility. ORS 9.480(1) provides:

> "The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:
>
> "(1) He has committed an act or carried on a course of conduct of such nature that, if he were applying for admission to the bar, his application should be denied; * * *
>
> "* * * * *."

Canon I states: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." Disciplinary Rule 1-102(A)(4) thereunder provides: "A lawyer shall not: * * * (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The facts are unusual for a disciplinary proceeding. The accused was stopped by a police officer for a routine traffic violation. A few weeks earlier, the accused small child had thrown the contents of the accused wallet into the fireplace, leaving him without the usual identification, including a driver's license. Having previously been employed as a deputy district attorney and still having in his possession his identification card from that office, which card contained his picture, he put the card in his wallet to use as possible identification in the event it was ever required. When the officer asked the accused for his driver's license, he was told about the loss of the license and of the other identification and was tendered the identification card depicting the accused as a deputy district attorney. When the officer asked whether the accused was presently employed by the District Attorney's office, the accused replied that he was.

It is the contention of the bar that the accused lied about his present employment to the police officer in the hope of getting privileged treatment. There is no doubt that he lied to the officer, and it is a fair inference that the accused hoped to get privileged treatment; otherwise, he would have told the officer, after tendering his identification card and being asked about his current employment status, that he was no longer so employed.

1. The Trial Board, by a 2-1 vote, found the accused not guilty because his misrepresentation did not occur in his capacity as a lawyer. The Review Board reversed the Trial Board, found the accused guilty as charged, and recommended that he be publicly reprimanded. It was held by the dissenting member of the Trial Board, and concurred in by the Review Board, that the accused

was guilty of violating ORS 162.365, which provides, in part:

"Criminal impersonation. (1) A person commits the crime of criminal impersonation if with intent to obtain a benefit or to injure or defraud another he falsely impersonates a public servant and does an act in such assumed character.

"* * * * * *."

Without going into detail, our research indicates that the accused was not guilty of a violation of the statute. The history of the act discloses that a necessary element of the crime is some sort of purported official action in the assumed character. Such action is lacking here since the accused did no more than to identify himself as a deputy district attorney.

2. It is also our opinion that the accused did not violate ORS 9.480(1) since such a single act, standing alone without more, is not sufficiently grievous to refuse admission to practice law to one who has completed four years of college and three years of law school and who has passed the bar.

3-5. We agree with the Review Board that it is not necessary that the act with which the accused is charged have been performed in his capacity as a lawyer for it to have violated the Disciplinary Rule. Neither is it necessary, in order to be disciplined, that the conduct be as grievous as that which would bar him from being admitted to practice had he performed the action as a non-

lawyer. Misrepresenting one's capacity as being that of a member of the bar engaged in the law enforcement process to an officer performing his official duties is not something expected of a lawyer. It is subtly different from the case of the ordinary motorist who tries to avoid a traffic citation by telling the officer that he, the motorist, is rushing to the hospital because his wife is having a baby. The degree of truthfulness expected from a lawyer is higher than that expected from others. However, in determining whether the accused misconduct was sufficiently serious to require a formal reprimand, it is only fair to note that the misconduct did not take place while the accused was acting in his capacity as a lawyer, nor was it such that it could be the subject of any sanction, civil or criminal, if performed by a non-lawyer. It is the court's conclusion, taking into consideration what it thinks it knows of human reactions in similar circumstances, that the accused conduct, while improper, does not rise to the dignity of requiring a formal reprimand by this court.

The proceeding is dismissed.

Supreme Court, U.S.
FILED
MAY 7 1993
OFFICE OF THE CLERK

No. 92-1449

In The

Supreme Court of the United States

October Term, 1992

ROBERT ROOSEVELT PARKER, JR.,

Petitioner,

v.

THE OREGON STATE BOARD OF BAR EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Supreme Court

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to review the Oregon Supreme Court's decision denying Petitioner admission to practice law in Oregon, when only one of Petitioner's constitutional claims was raised in the state court proceedings and, in that instance, the claim was made for the first time in his Petition for Reconsideration of the Oregon Supreme Court's opinion, such that it may not have been truly decided by the state supreme court.

2. Whether the Court should exercise its discretionary authority to review the Oregon Supreme Court's decision denying Petitioner admission to practice law in Oregon, when the Oregon Supreme Court, to the extent it may have considered or decided a federal constitutional question under the Due Process Clause or Equal Protection Clause of the 14th Amendment to the United States Constitution, did not do so in a manner which is in conflict with any decision of another state court of last resort, a U.S. Court of Appeals or the United States Supreme Court.

3. Whether the Court should exercise its discretionary authority to review the Oregon Supreme Court's decision denying Petitioner admission to practice law in Oregon, when the ample evidence of Petitioner's lack of requisite good moral character leads to the conclusion that Petitioner's admission to practice law did not turn on the state court's adherence to the standards and procedures to which Petitioner now objects.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

A. Factual History 1

B. Procedural History 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Petitioner's Failure to Timely or Properly Raise His Federal Questions Deprives the Court of Jurisdiction Under 28 USC § 1257(a) 4

II. There Is No Conflict Among States, Circuits, Or With This Court Over The Constitutional Propriety Of Admissions Standards Similar To Those In Oregon 7

III. Ample Evidence In The Record Established Petitioner's Lack of Good Moral Character Regardless Of Where The Burden Of Proof Was Placed 11

CONCLUSION 13

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Ailes v. Portland Meadows, Inc., 312 Or 376, 823 P2d 956 (1991) 4, 6

Bailey v. Anderson, 326 US 203 (1945) 6

Cardinale v. Louisiana, 394 US 437 (1969) 4, 6

Cooper v. Eugene School District No. 4J, 301 Or 358, 723 P2d 298 (1986) 5

Eddings v. Oklahoma, 455 US 104 (1982) 6

Herndon v. Georgia, 295 US 441 (1935) 7

Highway Com. v. Helliwell, 225 Or 588, 358 P2d 719 (1961) 5

In re Fine, 303 Or 314, 736 P2d 183 (1987) 13

In re Parker, 314 Or 143, ___ P2d ___ (1992) 4, 12

In re Rowell, 305 Or 584, 754 P2d 905 (1988) 8

Konigsberg v. State Bar, 353 US 252 (1957) 5, 9

Konigsberg v. State Bar, 366 US 36 (1961) 9, 10

Law Students Research Council v. Wadmond, 401 US 154 (1971) 10

Martin-Trigona v. Underwood, 529 F2d 33 (7th Cir. 1975) 9

Raley v. Ohio, 360 US 423 (1959) 6

Schware v. Board of Bar Examiners, 353 US 232 (1957) 7, 8

Speiser v. Randall, 357 US 513 (1958) 9, 10

State v. Hitz, 307 Or 183, 766 P2d 373 (1988) 5

TABLE OF AUTHORITIES – Continued

Page

Stembridge v. Georgia, 343 US 541 (1952) 6

Thompson v. Louisville, 362 US 199 (1960) 11, 13

CONSTITUTIONS, STATUTES, COURT RULES

U.S. Const., Amend. XIV 3, 4, 10

28 USC §1257(a) 4

Oregon Revised Statute 9.220(2) 2, 8, 11, 13

Oregon Revised Statute 9.529 5

Oregon Rule of Appellate Procedure 5.45(2) 5

Oregon Rule of Appellate Procedure 9.25(3) 6

Oregon Rule of Appellate Procedure 11.25 5

Oregon Rule for Admission 12.10(6) 8

STATEMENT OF THE CASE

A. Factual History.

Based on the evidence introduced into the record in this proceeding, the Board of Bar Examiners (BBX), essentially the "trial court" in this context, found: that Petitioner applied for admission to the State Bar of Michigan but the District Character and Fitness Committee in that state recommended against admission in 1986, and Petitioner withdrew his appeal of that decision; that, over several years, Petitioner engaged in a pattern of incurring large amounts of debt and then defaulting on these obligations; that, over a period of 12 years, Petitioner made little or no payment on a court-ordered child support obligation resulting in a $13,000 arrearage by 1990; that, while defending himself *pro se* in collection litigation, Petitioner gave sworn testimony that was incomplete and misleading, and admitted to engaging in tactics to delay the proceeding; that, on several occasions, Petitioner made incomplete or misleading statements in applications for credit; that Petitioner impersonated his employer, an Oregon state senator, to provide an employment reference for himself; that Petitioner admitted he stood by while a co-worker impersonated the same state senator on the phone in order to provide an employment reference for the Petitioner; that, despite being questioned by the state senator about an alleged impersonation incident, Petitioner denied that any impersonation took place and then failed to disclose for over three years the impersonation committed by Petitioner's co-worker; and that Petitioner refuses even today to identify the co-worker who committed the admitted impersonation on Petitioner's behalf.

Based on these findings, the BBX determined by a 10-3 vote that there were ample reasons to conclude that Petitioner did not possess the good moral character and general fitness to practice law required in Oregon (ORS 9.220(2)(b)). The BBX therefore rendered its decision recommending to the Oregon Supreme Court that the Petitioner's admissions application be denied. The three BBX members recommending admission deemed it appropriate that such admission, if it were to be granted, be conditional upon established and continued oversight of Petitioner's management of client funds.

B. Procedural History.

Respondent accepts Petitioner's statement of the procedural history of this case with the following additions:

At no time prior to or during the evidentiary hearings before the BBX, over three separate days in May, June and July of 1991, did Petitioner raise any concern or objection of constitutional dimension regarding the allocation of the burden of proof or the quantum of evidence required in Oregon bar admissions proceedings.

Nowhere in his Petition for Review or supporting Brief filed with the Oregon Supreme Court, and at no time during oral argument before that court, did Petitioner raise any constitutional claim regarding the allocation of the burden of proof or the quantum of evidence required in Oregon bar admissions proceedings.

The Oregon Supreme Court opinion denying Petitioner's application for admission was unanimous and

addressed only one of several grounds deemed sufficient by the BBX to warrant denial.

Petitioner then filed with the Oregon Supreme Court a Petition for Reconsideration in which he raised only one of the constitutional issues he now presents – whether the burden of proof allocated to Petitioner comports with the Due Process Clause under the 14th Amendment to the United States Constitution.

The order denying Petitioner's Petition for Reconsideration was silent as to whether the Oregon Supreme Court considered or decided the due process issue belatedly raised by Petitioner.

SUMMARY OF THE ARGUMENT

Petitioner did not timely raise his constitutional claims in the state court proceeding, nor can it be said with any certainty that the Oregon Supreme Court truly decided these federal questions. There is no conflict among jurisdictions or any compelling reason provided by inconsistencies in case law for the Court to review whether Oregon's burden of proof and quantum of evidence required in bar admissions matters are appropriate. Ample evidence in the record supports the Oregon Supreme Court's decision such that Petitioner's application for admission to practice law may very well have been denied regardless of the allocation of the burden of proof.

ARGUMENT

I. Petitioner's Failure to Timely or Properly Raise His Federal Questions Deprives the Court of Jurisdiction Under 28 USC §1257(a).

Although Petitioner presents five separate, federal questions to this Court, his contentions come down to whether the state practices in bar admissions proceedings of placing the burden of proof on the applicant, and of requiring such proof by clear and convincing evidence, were constitutionally defective. This Court has jurisdiction to consider these questions under 28 USC §1257(a) only if Petitioner properly and timely raised them in the state court proceedings. *Cardinale v. Louisiana*, 394 US 437 (1969). He did not do so.

Petitioner raised none of the now asserted constitutional claims before the Board of Bar Examiners (BBX), the "trial court" in Oregon's bar admissions system. Petitioner also failed to raise initially any federal question before the Oregon Supreme Court, either in his Petition for Review and Supporting Brief or during argument. Not until the Oregon Supreme Court denied Petitioner's admission, *In re Parker*, 314 Or 143, ___ P2d ___ (1992), did he file a Petition for Reconsideration with the state supreme court raising for the first time a constitutional issue, and only one – that placing the burden of proof on Petitioner violated the Due Process Clause of the 14th Amendment to the U. S. Constitution.

In Oregon, the general rule is that an issue must be raised and preserved at trial in order for it to be considered on appeal. *Ailes v. Portland Meadows, Inc.*, 312 Or 376,

823 P2d 956 (1991), relying on Oregon Rule of Appellate Procedure (ORAP) 5.45(2) which provides:

> "No matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief; provided that the appellate court may consider errors of law apparent on the face of the record."

While this preservation principle is not rigid, Oregon courts have generally ruled that constitutional questions, particularly, will not be considered for the first time on appeal if not at least raised below. *State v. Hitz*, 307 Or 183, 766 P2d 373 (1988); *Cooper v. Eugene School District No. 4J*, 301 Or 358, n. 12, 723 P2d 298 (1986); *Highway Com. v. Helliwell*, 225 Or 588, 591, 358 P2d 719 (1961).

Less clear is whether the unique nature of Bar admissions proceedings render this preservation principle inapplicable. Bar admissions cases are matters of original jurisdiction with the state supreme court, neither civil nor criminal in nature but *sui generis*. Oregon Revised Statute (ORS) 9.529. They are subject to their own method of appellate review. See ORAP 11.25, regarding appellate procedure in Bar admissions, reinstatement and discipline matters. Indeed, *Konigsberg v. State Bar*, 353 US 252, 254-58 (1957), suggests a bar admissions applicant will not be strictly held to procedural requirements regarding issue preservation for appeal.

Distinguishing *Konigsberg* from Petitioner's case, however, is that the applicant in *Konigsberg* asserted his constitutional claims orally at hearing and in writing to the California Supreme Court. Here, Petitioner raised no constitutional claim until after his case was decided by

the Oregon Supreme Court. There was, therefore, no opportunity for the BBX to compile a record with the federal questions in mind or to determine whether its decision would be any different were petitioner's objections to be remedied – important considerations under *Cardinale v. Louisiana*, 394 US 437, 439 (1969). At the appellate level, there was no full airing of the federal claims through competing arguments of adversary parties in briefs and oral argument, deemed critical for appellate review in Oregon. *Ailes v. Portland Meadows, Inc., supra*, 312 Or at 382.

Was Petitioner's failure to raise his constitutional questions before the Board of Bar Examiners or the Supreme Court on review "cured", at least as to the one federal question regarding burden of proof, when Petitioner raised it in his Petition for Reconsideration, which the Oregon Supreme Court denied? The answer may be yes *if* the Oregon Supreme Court actually considered and decided the federal question in the course of denying the reconsideration petition. *Raley v. Ohio*, 360 US 423, 436-437 (1959). However, when the state court is silent as to the basis of its denial, as here, jurisdiction by this Court is debatable and therefore should not be exercised. *Stembridge v. Georgia*, 343 US 541, 547-48 (1952); *Bailey v. Anderson*, 326 US 203, 206-07 (1945). *Cf., Eddings v. Oklahoma*, 455 US 104 (1982), where a federal question raised for the first time in a petition for rehearing was considered timely after the state court permitted arguments on the question and the court's subsequent order of denial stated that the arguments were fully considered. In Oregon, ORAP 9.25(3) precludes any response to a petition for reconsideration except at the express request of the

court. No such arguments were requested or allowed by the Oregon Supreme Court in this case.

Finally, petitioner asserts that some of his federal questions could not have been raised sooner than his Petition for Reconsideration because he could not have anticipated the Oregon Supreme Court to rule the way that it did. *Herndon v. Georgia*, 295 US 441, 443-44 (1934). First, it bears repeating that Petitioner's reconsideration request raised but one constitutional argument, regarding burden of proof. Second, the burden of proof and quantum of evidence in Oregon bar admissions matters were clear and known to Petitioner from the outset. If Petitioner believed there were constitutional objections to these standards, asserting those objections did not need to await the issuance of the Oregon Supreme Court's opinion.

This Court should not entertain the Petition for Writ of Certiorari based on contentions that were not timely and properly raised, but clearly were afterthoughts following the decision of the Oregon Supreme Court denying Petitioner's application for admission to practice law.

II. There Is No Conflict Among States, Circuits, Or With This Court Over The Constitutional Propriety Of Admissions Standards Similar To Those In Oregon.

This Court has long held that states are free to establish standards by which applicants for admission to practice law are measured, provided that any such qualification has a rational connection with an applicant's fitness or capacity to practice. *Schware v. Board of Bar*

Examiners, 353 US 232 (1957). Oregon follows the *Schware* directive in Oregon Revised Statute (ORS) 9.220(2), which provides:

> 9.220 General requirements for admission. An applicant for admission as attorney must apply to the Supreme Court and show that the applicant:
>
> * * *
>
> (2) (a) Is a person of good moral character and fit to practice law.
>
> (b) For purposes of this section and ORS 9.025, 9.070, 9.110, 9.130, 9.210, 9.250, 9.527 and 9.545, the lack of "good moral character" may be established by reference to acts or conduct that reflect moral turpitude or to acts or conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation. The conduct or acts in question should be rationally connected to the applicant's fitness to practice law.

Like many other states, Oregon places the burden of proving good moral character and fitness on the applicant. Rule for Admission 12.10(6); *In re Rowell*, 305 Or 584, 754 P2d 905 (1988).

Petitioner has pointed to no decision of this Court, any federal circuit or any state court of last resort, and Respondent has found none, which holds in a bar admissions context that placing the burden of proof on an applicant or requiring proof by clear and convincing evidence violates due process of law. To the contrary, existing case law rejects such a contention.

In *Konigsberg v. State Bar*, 353 US 252 (1957), this Court reversed a California state court decision denying a bar applicant's admission to practice law, for lack of evidence in the record rationally justifying the denial. In a dissent from the majority opinion regarding the sufficiency of the evidence, Justice Harlan stated that the Court did not "find wanting in any respect" California's good moral character requirement or the state rule of practice placing the burden of proof on the applicant, noting that 46 of 48 states then did so. *Id.* at 278. Four years later, this time writing for the majority in the sequel *Konigsberg v. State Bar*, 366 US 36 (1961), Justice Harlan again referred to the many jurisdictions in which an applicant for admission to the bar bears the burden of proving good moral character, "a requirement whose validity is not, nor could well be, drawn in question here." 366 US at 40-41.

At the circuit level, there is *Martin-Trigona v. Underwood*, 529 F2d 33 (7th Cir. 1975). There, a challenge on due process grounds to Illinois' admissions process generally and to the allocation of the burden of proof to the applicant specifically, was rejected with reference to *Konigsberg II*.

Much is made by Petitioner of *Speiser v. Randall*, 357 US 513 (1958), a case not involving bar admissions but the propriety of a state provision conferring tax exempt status only to those who carry out the burden of proving they do not advocate the overthrow of the government. This Court struck the state provision, finding that placing the burden of proving non-advocacy of government overthrow on the taxpayer was violative of due process considerations.

Speiser is no reason for this Court to grant certiorari in Petitioner's case. The holding in *Speiser* was expressly limited to those state provisions which are curbs on the constitutional right to speak and, with this limitation, the holding is not necessarily or automatically applicable to the bar admissions context. This was made abundantly clear in the second *Konigsberg v. State Bar*, 366 US 36 (1961), in which this Court emphasized the distinction in *Speiser* between statutes the intent of which is to penalize the expression of political beliefs, on the one hand, and statutes the intent of which is merely to regulate access to positions where unfitness may lead to abuse detrimental to the public interest, like membership to the bar. For the former category of statutes, *Speiser* requires that the state must bear the burden of proving justification for inhibiting speech. No such requirement exists for the latter category. Compare *Law Students Research Council v. Wadmond*, 401 US 154 (1971), in which this Court upheld New York's character and fitness requirement but questioned, without deciding, whether placing the burden of proof on a bar applicant in the form of a loyalty oath likely to inhibit speech was permitted under the Due Process Clause of the 14th Amendment.

No inhibition of free speech is implicated in Petitioner's case or in the Oregon system regulating bar admission by placing the burden of proving good moral character on the applicant. Neither *Speiser v. Randall, supra*, nor any other decision of this Court, of federal circuits or of state courts of last resort, has determined that such a regulatory scheme is constitutionally defective.

III. Ample Evidence In The Record Established Petitioner's Lack of Good Moral Character Regardless Of Where The Burden Of Proof Was Placed.

Petitioner urges this Court to review the legal standards involving the burden of proof and quantum of evidence required in Oregon bar admissions matters. Ultimately, however, the evaluation of an applicant who wishes to be admitted to practice law is very fact-specific, determined by the evidence of the applicant's good moral character and fitness. Oregon Revised Statute (ORS) 9.220(2).

When evidence is in dispute or credibility of witnesses is in question, allocation of the burden of proof and the quantum of evidence required may, in a given case, affect the moral character and fitness evaluation. In this case, however, there was ample evidence, much of it undisputed, supporting a conclusion adverse to Petitioner regardless of who had the burden of proof and regardless of the quantum of evidence required. This is further reason why Petitioner's claims are not appropriate candidates for review by this Court.

Petitioner suggests that the Oregon Supreme Court denied his admission "without any evidence in its opinion" to support such a result, citing *Thompson v. Louisville*, 362 US 199 (1960). Petition for Writ at 26. This assertion is not correct, but even if it were, it is the *record* of the proceeding which must be examined for evidence, not merely the language of the state supreme court opinion. In this regard, it is important to note that the state supreme court expressly chose to discuss but one of several grounds deemed sufficient by the Board of Bar

Examiners to deny Petitioner's application. *In re Parker*, 314 Or 143, n. 2, ___ P2d ___ (1992).

Petitioner's "no evidence" assertion calls for a brief review of the record. Aside from the issue of impersonating a state senator upon which the state supreme court focused, and referencing only evidence undisputed or admitted by Petitioner, the record before the BBX established: that Petitioner's application for admission in Michigan was recommended for denial in part because Petitioner failed to appear in court or pay traffic tickets resulting in at least one bench warrant being issued against him; that Petitioner incurred large amounts of debt, defaulted on many of his obligations and failed to satisfy judgments obtained against him; that Petitioner paid little or nothing over 12 years on a modest $100 per month court-ordered child support obligation; that Petitioner submitted applications for credit which contained incomplete information regarding his outstanding debts and length of employment; and that Petitioner engaged in delaying tactics in litigation in which he appeared *pro se*.

The state supreme court saw no need to discuss these many findings adverse to Petitioner but instead focused its attention on two episodes of alleged impersonation of Petitioner's employer, then State Senator James Hill. Evidence regarding one such episode was in dispute. The other episode, however, was established by admissions from Petitioner and uncontroverted testimony from Senator Hill, quoted in the Supreme Court opinion and set forth at pages 43a-47a of the Petition for Writ. This testimony established: that Petitioner witnessed another individual impersonating Senator Hill on Petitioner's behalf during a phone call; that, when asked, Petitioner denied

to Senator Hill and others that any impersonation took place; and that Petitioner did not disclose this undisputed impersonation for over three years thereafter.

Clearly, there was "evidence" in the *Thompson v. Louisville* sense supporting the BBX and state supreme court's rejection of Petitioner's admissions application. It is also reasonable to conclude that, based on this uncontroverted evidence "which would cause a reasonable person to have substantial doubts about [Petitioner's] honesty, fairness and respect for the rights of others and the laws of the state and the nation", ORS 9.220(2)(b), Petitioner's admission to practice law did not turn on who had the burden of proof or the quantum of evidence required. Had Petitioner timely raised his now asserted constitutional claims, the Oregon Supreme Court may very well have said so, as it did in another contested admissions case where similar challenges were raised. See *In re Fine*, 303 Or 314, n. 1, 736 P2d 183 (1987).

CONCLUSION

Bar admissions standards should not be arbitrary barriers to those qualified to practice law, but they must be an effective method of protecting the public from individuals lacking the character and fitness required of lawyers. Petitioner has provided no reason under the Federal Constitution for this Court to question Oregon's admissions standards as applied in Petitioner's case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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May 1993

OREGON REVISED STATUTE 9.529 Status of proceedings relating to discipline; admission or reinstatement. Bar proceedings relating to discipline, admission and reinstatement are neither civil nor criminal in nature. They are sui generis and within the inherent power of the Supreme Court to control. The grounds for denying any applicant admission or reinstatement or for the discipline of attorneys set forth in this chapter are not intended to limit or alter the inherent power of the Supreme Court to deny any applicant admission or reinstatement to the bar or to discipline a member of the bar.

ORAP 9.25 RECONSIDERATION IN SUPREME COURT

(1) A party seeking reconsideration of a decision of the Supreme Court shall file a petition for reconsideration within 21 days from the date of the decision. The petition shall be in the form of a brief, prepared in conformity with Rule 5.05, insofar as it is applicable. The petition shall include a copy of the court's decision. A petitioner shall identify on the cover which party is the petitioner, the date of the decision, and, if there is an opinion or if there are opinions, the judges who joined therein.

(2) The petitioner shall file the original and 12 copies of the petition with the Administrator. The original shall show proof of service of 2 copies on every other party to the appeal or review.

(3) No other party shall respond unless the court so requests.

(4) The court shall either deny or allow reconsideration. If the court allows reconsideration, the court may

reconsider with or without further briefing or oral argument. Reconsideration shall result in affirmance, modification or reversal of the decision that has been reconsidered.

ORAP 11.25 BAR ADMISSION, REINSTATEMENT AND DISCIPLINARY PROCEEDINGS.

(1) As used in this rule, the following are parties:

(a) The Oregon State Bar in a disciplinary, contested admission or contested reinstatement proceeding.

(b) The accused in a disciplinary proceeding.

(c) The applicant in a contested admission proceeding.

(d) The applicant in a contested reinstatement proceeding.

(2)(a) A petition concerning a disciplinary proceeding, a bar applicant's contested admission or a former member's contested reinstatement shall be filed with the Administrator, together with an opening brief, with proof of service on all parties, within 28 days after written notice to the Bar's Disciplinary Counsel and the parties of the court's receipt of the decision of the trial panel under Oregon State Bar Rule of Procedure 10.5(a). An answering brief shall be due 28 days after filing of the opening brief. A reply brief, if any, shall be due 14 days after filing of the answering brief.

(b) A brief in any of the proceedings named in this rule shall conform to Rule 5.05, 5.10 and 5.35, except that no abstract of record is required, and shall show proof of

service on all parties to that proceeding. The Bar shall be served by service on the Bar's Disciplinary Counsel.

(3) If, notwithstanding Bar Rule of Procedure 10.5(b), an accused who is required to file a petition and brief fails to do so within the time allowed under Bar Rule of Procedure 10.5(a), the Bar shall:

(a) File a petition and brief within the time allowed for filing an answering brief. The brief shall comply with the rules governing petitions and opening briefs. At the time the petition and brief are filed, the Bar shall indicate whether it wishes to waive oral argument and submit the case on the record, or

(b) Submit a letter stating that it wishes the matter submitted to the court on the record without briefing or oral argument. Notwithstanding waiver of briefing and oral argument under this subsection, at the direction of the Supreme Court, the Bar shall file a petition and brief within the time directed by the court.

(4) If the case is argued orally, the party who files the opening brief shall argue first.

OREGON RULE FOR ADMISSION 12.10 The proceeding.

* * *

(6) *Burden of Proof.* To be entitled to admission to the practice of law in Oregon, an Applicant must establish by clear and convincing evidence that she or he has the requisite character and fitness to practice law.

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

No. 92-1449

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT ROOSEVELT PARKER, JR.,
Petitioner,

v.

THE OREGON STATE BOARD OF BAR EXAMINERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

U. S. Cases: Page

Boykin v. *Alabama*, 395 U.S. 238 (1969). 5

Cardinale v. *Louisiana*, 394 U.S. 439 (1969). 5

District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983). 5, 6

Hathorn v. *Lovorn*, 457 U.S. 255 (1982). 6

Herndon v. *Georgia*, 295 U.S. 441 (1935). 6

Konigsberg v. *State Bar #2*, 366 U.S. 36 (1961). 2

Law Students Research Council v. *Wadmond*, 401 U.S. 154 (1971). 2

Napue v. *Illinois*, 360 U.S. 264 (1959). 6

Raley v. *Ohio*, 360 U.S. 423 (1959). 6

Speiser v. *Randall*, 357 U.S. 513 (1958). 2, 3

Vachon v. *New Hampshire*, 414 U.S. 478 (1974). 6

Wood v. *Georgia*, 450 U.S. 261 (1981). 6

Oregon Cases:

In re Parker, 314 Or. 143, ___P2d___ (1992). 2, 4

In re Steffen, 279 Or. 313, 567 P2d 544 (1977). 4

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1. Respondent incorrectly characterizes this Petition as seeking reversal of a decision based on the record of the Board of Bar Examiners (BBX) considered as a "trial court." The unconstitutional state action for which petitioner seeks reversal and remand here is the action of the Supreme Court of Oregon sitting de novo and denying petitioner admission to the bar on a single ground proposed by the BBX. Or, as respondent puts it, "Bar admissions cases are matters of original jurisdiction with the state supreme court. . . ." Resp. Br., 5.

2. This Court is not asked to bog down here in a factual morass to second-guess the Oregon Supreme Court, much less the

BBX. Petitioner seeks only straightforward constitutional relief if this Court grants his petition for certiorari: reversal and remand of the decision of the Oregon Supreme Court for proceedings not inconsistent with this Court's opinion herein.

3. The chief constitutional offense herein of the Oregon Supreme Court as state actor is the highly unusual, perhaps unique, imposition on petitioner of a burden of proving his "good moral character" by "clear and convincing evidence". Neither petitioner nor, apparently, respondent have yet discovered one other state in which this drastic exclusionary standard is imposed.

4. Petitioner also asks this Court to consider whether existing constitutional cases justify even the more familiar imposition of a simple "preponderance" burden of proof on a bar applicant and on an attorney under Bar charges (in Oregon law the two are treated alike, cf. No. 8, below). This point is not adequately answered by citing, as respondent does , Konigsberg v. State Bar #2, 366 U.S. 36 (1961). In fact, respondent's brief echoes petitioner's reminder that the later Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) questioned placing the burden of proof on a bar applicant.

The underlying rationale of Speiser v. Randall, 357 U.S. 513 (1958) cries out for constitutional protection from any burden of proof standard--even a simple "preponderance"-- that is applied with the breadth the Oregon Supreme Court uses here. In this case (In Re Parker, Pet. App. 3 at 39a) the Oregon Supreme Court expressly held that "disposition of the case is made on the impersonation issue". The Court totally disregarded ("we do not reach. . .") other issues and charges. Moreover, in face of "conflicting testimony" (Id., at 39a) with respect to the impersonation issue the Court held that the testimony of one witness "Ms. Thomas is credible and the impersonating conversation that she recounts took place." (Id. at 49a). At this point the Court extended petitioner's burden of proof to extend to individual contested issues of fact: "It follows that applicant cannot prevail on this point [or in his case which the point decides], because it was his burden to convince us that the conversation did not occur as she recounted it." (Id. at 49a). Of course, under the applicable Oregon rule applicant's burden

was to "convince us" by "clear and convincing evidence." The further point made here is that even if this Court were to permit a simple preponderance burden of proof rule in bar admission cases, it should strike down such a rule when it is applied to every individual discrete determination of fact, especially one that is made determinative of denial of admission to the bar. Surely such an application of any burden of proof rule violates Due Process.

5. Respondent dispenses this Court from any concern with Speiser v. Randall, 357 U.S. 513 (1958) because, he incorrectly alleges, "No inhibition of free speech is implicated in Petitioner's case. . . ." Petitioner's express argument that free speech inhibition is implicated in his case appears at p. 19 of his petition.

6. There is a revealing concession at p. 11 of respondent's brief: "When evidence is in dispute or credibility of witnesses is in question, allocation of the burden of proof and the quantum of evidence required may, in a given case, affect the moral character and fitness evaluation." Respondent's counsel of record then contributes an astounding "reassurance" to this Court: "In this case, however, there was ample evidence, much of it undisputed, supporting a conclusion adverse to Petitioner regardless of who had the burden of proof and regardless of the quantum of evidence required." Respondent's counsel then adds: "This is further reason why Petitioner's claims are not appropriate candidates for review by this Court." (Id. at 11). Recalling (see No. 4, par. 2, above) that the Oregon Supreme Court herein declined to value any of this evidence except impersonation in the de novo proceeding now before this Court, this suggestion fairly "shocks the conscience"-- even more than respondent's parading much of this rejected evidence in his so-called "Factual History" (Resp. Br., p. 1). One can hardly visualize a prosecuting attorney in this posture advising this Court: "No need to waste time by reviewing for any violation of Due Process, we have plenty more evidence 'much of it undisputed.' Trust me."

7. The State Bar brief filed for respondent states that "existing case law rejects . . . a contention" that "requiring proof by clear and convincing evidence violates due process of law." (Resp. Br., 8) It

cites no such cases. So far as counsel for petitioner has been able to learn--there are no such cases. (See Par. 3, above.)

8. Not once, but twice (at pp. 4 and 7), Respondent's brief makes the same clearly incorrect and prejudicial statement: That in his Petition for Reconsideration petitioner raised "only one" constitutional issue, the Due Process Clause argument concerning burden of proof. In fact, in his Petition for Reconsideration (Pet. App. 4, pp. 57a and 63a) Petitioner calls the Oregon Supreme Court's attention to In Re Steffen (Pet. App. 7, pp. 89a-96a), and to the fact that the present decision must be changed or face constitutional reversal--clearly on Equal Protection grounds-- because the two cases, Steffen and Parker, he argues, are "indistinguishable". There is no dispute that Oregon Statute ORS 9.480(1) cited in Steffen (at Pet., 93a) and Oregon Statute ORS 9.527(1) (at Pet. App. 1A, p. 7a) are identical. They establish that under Oregon law disciplinary conduct for a lawyer is measured by the same standards as if he were applying for admission to the bar.

9. By camouflaging petitioner's Equal Protection claim Respondent would put at rest the clearly evident issue of race that has dogged the Parker proceeding from its inception. Petitioner Parker's Petition for Reconsideration, at the place cited above (Pet. App. 4, p. 63a) highlighted the race issue: "Reconsideration is necessary to eradicate the false impression that the only difference between Parker and Steffen is their race."

Earlier indications of a racial factor in this proceeding were cited at p. 13 of the Petition. There is some evidence that a relentless pursuit of petitioner had political origins (see Pet. App. 6, 77a-79a). Associate Justice Peterson of the Oregon Supreme Court, the head of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, had sat on reviews of the Parker case. His comments, cited in the Petition at p. 13,, were made after some months of hearings (which began shortly before the Supreme Court decision in In Re Parker (Pet. App. 3). Other comments (not by Justice Peterson) cited in the Oregon State Bar Bulletin article (cited at Pet., 13) pointed to the courts: "Asking the system to change without including the judges is like asking someone who is depressed to just cheer up." The

commenter added that "Bias is usually unwitting." (Id. at 12-13). An unwitting adverse ethnical bias was conceded by even some of petitioner's supporters. (Id. at 10). One lawyer, friendlier than most, is sadly reported as saying to Petitioner: "The trouble with you Bob is that you think you are equal." All this points to the likely distortions in putting a burden of proof of good moral character on bar applicants of diverse ethnic origins-- especially with a requirement of proof by "clear and convincing evidence."

10. JURISDICTION. The postulate for jurisdiction here is, as stated in the Petition, that there was no independent and adequate state ground upon which to rest the decision herein of the Oregon Supreme Court and that the questions raised on this petition for certiorari were properly presented.

No question seems involved with respect to independent and adequate state ground. The Supreme Court cases listed below adequately support jurisdiction where the questions were presented at a motion for rehearing or, as here, on a Petition for Reconsideration which was "considered" by the Oregon Supreme Court. See Pet., App. 4A: "The court has considered the Petition for Reconsideration and orders that it be denied".

The Petition for Reconsideration adequately presented issues of Due Process of Law and Equal Protection of the Laws (see No. 8, above) on September 22, 1992 and the Oregon Supreme Court "considered" these claims until November 24, 1992, when it elected not to afford a forum to these federal issues in this case:

The Jurisdiction Cases:

Boykin v. Alabama, 395 U.S. 238 (1969);

Cardinale v. Louisiana, 394 U.S. 439 (1969);

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983);

Hathorn v. Lovorn, 457 U.S. 255 (1982);

Herndon v. Georgia, 295 U.S. 441 (1935);

Napue v. Illinois, 360 U.S. 264 (1959);

Raley v. Ohio, 360 U.S. 423 (1959);

Vachon v. New Hampshire, 414 U.S. 478 (1974);

Wood v. Georgia, 450 U.S. 261 (1981).

Of particular significance is the case of Wood v. Georgia, 450 U.S. 261 (1981) in which this Court found there was ample support for a remand in the interests of justice, citing 28 U.S.C. #2106 "authorizing this Court to require such further proceedings to be had as may be just under the circumstances."

The entire procedure of seeking a petition for certiorari is, of course, instinct with the element of discretion in the Supreme Court. If the Court, in its discretion, finds merit in the constitutional elements of this Petition, as petitioner hopes that it will, Wood makes clear that the Court will not allow a state court to manipulate a non-decision of constitutional claims by this Court. A state court which has been apprised of constitutional claims by use of its established procedure (here a Petition for Reconsideration) may not foreclose the Supreme Court's hearing of those constitutional claims.

CONCLUSION

Another of the cases cited above--- District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)---points out (at 482-3, n. 16, where most of the relevant cases are gathered) that "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court on certiorari to the state court, and not by means of an original action in a lower federal court." Hence, there is no value in respondent's argument (Resp. Br., 8) that absence of traditional hallmarks of "cert

granted" such as conflict of circuits is fatal. And the scarcity (if not nonexistence, see No. 3, above) of other states with "clear and convincing evidence" burdens of proof in bar cases explains the unavailability of state decisions.

The Petition for certiorari should be granted.

Respectfully submitted,

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